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THE

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CHANCERY DIVISION

AND CASES IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL

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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Gascoigne *v.* Gascoigne	[1918] 1 K.B. 223		735
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Victoria Laundry (Windsor) Ld. *v.* Newman Industries Ld.	[1949] 2 K.B. 528	*Appl.*	771, 779
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1601

43 *Eliz.* 1, *c.* 4 - - - - - **C.A. 504**

1837

Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 33 - - - - **Upjohn J. 367**

1848

Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s* 19 - - **C.A. 335**

1862

Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 38 (7), 74 - **Roxburgh J. 689**

1869

Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5. **Harman J. 1**
C.A. 195

1879

Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict. c.* 49), *ss.* 6, 35 - **C.A. 335**

1891

Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 112, 113 - - - - - **C.A. 395**

1901

Derby Corporation Act, 1901 (1 *Edw.* 7, *c.* cclxvii), *ss.* 109, 113 - - **C.A. 149**

1914

Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 1 (1) (*g*) - - - **C.A. 335**

—— —— *s.* 107 (4) - - - **C.A. 195**

—— —— *s.* 108 (2) (*c*) - - **Divl.Ct. 144**

1918

Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules*, *rr.* 19, 21. **Upjohn J. 566**

—— —— *Sch. D*, *Cases I and II*, *r.* 3 (*a*) **C.A. 7**

—— —— *Sch. D.*, *Cases I and II*, *r.* 3 (*a*). **Harman J. 601**

1925

Guardianship of Infants Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 45), *s.* 3 (1) (2) **Roxburgh J. 787**

Land Charges Act, 1925 (15 *Geo.* 5, *c.* 22), *ss.* 6, 20 - - - **Upjohn J. 299**

Land Registration Act, 1925 (15 *Geo.* 5, *c.* 21), *s.* 70 (1) (*g*) - **Vaisey J. 382**

Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 25 (1) - **Harman J. 716**

—— —— *ss.* 30, 195, 205 (1) (x) **Upjohn J. 299**

—— —— *s.* 164 - - **Danckwerts J. 459**

Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 64 - - - - - **C.A. 218**

—— —— *ss.* 73 (i) (iv), 75 (1) (2), 83, 107, Sch. III - - **Harman J. 792**

—— —— *s.* 106 - - - - **C.A. 647**

Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 36 (1) (8) - - - **Danckwerts J. 59**

—— —— *s.* 57 - - - - **C.A. 218**

1927

Finance Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 55 - - - - - **C.A. 395**

1929

Derbyshire and Nottinghamshire Electric Power Act, 1929 (19 *&* 20 *Geo.* 5, *c.* lxxxvi), *s.* 37 - - **C.A. 149**

1930

Finance Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 28), *s.* 41 - - - - - **C.A. 395**

1932

Solicitors Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *ss.* 64, 66 - - - - **C.A. 480**

1943

War Damage Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 7, 13, 14, 20, 32 - **Vaisey J. 51**

1944

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1946

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1947

Electricity Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 54), *s.* 57 - - - - - **C.A. 149**

Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 36 - - - **Upjohn J. 499**

—— —— *ss.* 52 (1) (2); 54 (1) - **C.A. 504**

1948

Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 1 (2), 81 (1), 94 (1), 96 (1), Sch. III - **Harman J. 792**

Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 26 (2), 212 (1) (2), 213. **Roxburgh J. 689**

—— —— *ss.* 236 (1) (2), 270, 307, 334 (3) **C.A. 488**

1949

Finance Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 47), *s.* 27 - - - - - **C.A. 545**

Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *ss.* 2 (2) (*b*), 6 (5), *Sch. III* - - - - **C.A. 320**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Bankruptcy Rules, 1952 (*S.I.* 1952, *No.* 2113) (*L.*14), *rr.* 130, 389 - **Divl.Ct. 144**

Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (*S.R. & O.* 1946, *No.* 1884), *arts.* 1, 4 (1), 5 (1). **C.A. 96**

Legal Aid (General) Regulations, 1950 (*S.I.* 1950, *No.* 1359), *reg.* 18 (3) **C.A. 320**

R.S.C. Ord. 25, *r.* 5 - - **Harman J. 423**

Solicitors' Remuneration (Gross Sum) Order, 1934 (*S.R. & O.*, 1934, *No.* 548 (*L.*13)), *art.* 1 - - **C.A. 480**

Solicitors' Remuneration Order, 1882 (*General Order of* 1882), *art.* 2 (*c*) - **C.A. 480**

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL

In re A JUDGMENT SUMMONS (No. 25 OF 1952). *Ex parte* HENLYS LD.

1952
Oct. 20.

Harman J.

Debt—Judgment debt—Extortion—Costs wrongly demanded—Bankruptcy petition dismissed—Judgment summons based on same debt—Summons dismissed—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5.

A bankruptcy notice served on a judgment debtor was withdrawn on certain terms, which included payment of 12 guineas, costs of the notice and certain further costs. When the debtor failed to pay further instalments of the debt, the creditors presented a bankruptcy petition against him. The registrar dismissed the petition on the ground that the demand for the 12 guineas was not justified, and amounted to extortion. On a judgment summons taken out by the creditors in respect of the same debt:—

Held, that no proceedings in bankruptcy can be based on a debt which is tainted with the vice of extortion, and that by analogy with bankruptcy law, the court would not in the exercise of its discretion allow a judgment summons founded on a debt so tainted, and the summons must be dismissed.

In re a Debtor [1928] Ch. 199 followed.

JUDGMENT SUMMONS.

On April 25, 1951, judgment was given against a debtor for a sum which with the taxed costs of the action amounted to some £449. On November 2, 1951, a bankruptcy notice was served in respect of that debt. After service of the notice negotiations took place as to the terms on which it could be withdrawn. The

1952

A JUDGMENT SUMMONS (No. 25 OF 1952), *In re.* *Ex parte* HENLYS LD.

terms agreed were a payment of £100 down, and monthly instalments of £50.

In the course of subsequent correspondence between the parties' solicitors, the creditors' solicitors wrote on November 22, 1951, when the first £100 was paid: "We must also insist that "our additional costs of the bankruptcy notice and these arrange-"ments be paid by your client, and as we have had to instruct "Messrs. Flowerdews to serve and we have incurred expense "thereby in addition to the expense of preparing and issuing the "bankruptcy notice and the subsequent correspondence with "you; our costs will be 12 guineas which must be added to "the debt." This sum also included expenses incurred in the winding up of a company controlled by the debtor. The debtor's solicitors paid these costs, but stated that they did so with great reluctance.

The debtor failed to keep up his instalments, and a bankruptcy petition was presented against him. The petition was filed on March 31, 1952, and came before the registrar on May 2, 1952. The point was there taken that the demand and payment of the 12 guineas costs were not justified by the bankruptcy notice and constituted an impropriety amounting to extortion. The registrar accepted that argument and dismissed the petition. There was no appeal against that order.

Nothing had been paid since then, and in July, 1952, leave was given to issue a judgment summons in respect of the same debt, the summons being issued on August 8, 1952.

The debtor applied by way of a preliminary point to have the judgment summons dismissed on the ground that a judgment summons ought not to be allowed to issue in cases where a bankruptcy petition could not issue.

Claude Duveen for the debtor. The demand for 12 guineas costs was wrong; in bankruptcy law it amounted to extortion. Once a debt is tainted with extortion no further proceedings in bankruptcy can be taken in respect of the same debt: see Williams on Bankruptcy, 16th ed., p. 68. The principle stated in Williams is based on *In re a Debtor.*[1]

There is no authority directly in point, but the principle which applies in bankruptcy proceedings must apply equally in the case of a judgment summons.

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[1] [1928] Ch. 199.

Where a creditor uses the threat of bankruptcy proceedings to obtain more than is due to him that debt is tainted by the vice of extortion, and the court will refuse him any further assistance in respect of that debt; and a creditor who uses the threat of committal under the Debtors Act to obtain more than is due to him must be similarly disentitled.

The jurisdiction under section 5 of the Debtors Act, 1869, was assigned to the bankruptcy judge: see section 107 of the Bankruptcy Act, 1914. By subsection (4) of section 107 the court may make a receiving order instead of committing a man to prison, but he cannot by the procedure under that subsection procure greater assistance than he would be able to by the normal bankruptcy procedure, and the same rule must therefore apply in debt as in bankruptcy. The position is the same whether a creditor has obtained more than is due to him or only attempted to do so.

Patrick O'Connor for the creditors. If the principle suggested on behalf of the debtor were right it would mean that this creditor is barred for all time from his remedy, merely because he has, by error, asked for a small sum for costs, not realizing that he was not entitled to it.

This doctrine is without authority. It would not be right if the discretion of this Division should be fettered in this way. It would follow that if the debtor succeeds in this application because of a technical error under the bankruptcy rules, it would be allowable for any mere technicality to defeat a creditor's claim. The rule suggested is not supported by the cases. [He referred to *In re a Debtor* [1] and *Re G.* [2]]

It is submitted that the wider rule that the discretion of the court must not be fettered is correct. The fact that the registrar found that the case was within the extortion rule does not affect the discretion of the court.

Duveen replied.

HARMAN J. The point is taken that, in cases where no bankruptcy petition can issue, no judgment summons ought to be allowed to issue either, because the two things are intimately connected; these are two ways in which the court may be asked to assist a creditor to collect his just dues: it is said that if in one way he may not have the assistance of the court, then he may not in the other.

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[1] [1928] Ch. 199.

[2] (1900) 44 S.J. 345.

The point is a novel one, there being no reported authority on the subject. First, therefore, am I to look behind the judgment of the registrar in any way? The registrar dismissed the petition, but the order, on its face, does not say why he dismissed it. I am therefore, I think, bound to look behind the order, because otherwise I cannot say that there is any connexion between the dismissal of the petition, which might be for any of a dozen reasons, and the vice which is said to taint this debt. I must, therefore, ascertain what induced the registrar to come to the conclusion which he reached, and there is no dispute between the parties that it was the successful demand for 12 guineas costs.

I have been referred to *In re a Debtor* [3] as showing that a demand for costs of this sort is fatal to the presentation of a second petition. In that case a petition was presented, and under the terms agreed sums of money were to be paid by way of instalments to the petitioners' solicitors, and in addition their costs, which included a sum of £15, the difference between party and party and solicitor and client costs which they were not entitled to demand. They also demanded, but did not obtain, payment of some costs owing by other parties, namely, underwriters, which they had no title to demand at all. The court came to the conclusion that the second petition which they subsequently presented was therefore a petition on which the court would make no order. It is true that that petition was for £15 more than it should have been, because the petitioners' solicitors had appropriated to themselves £15 of the bankrupt's payments for costs which they should have attributed to their client's debt, so that the petition was in that sense for an excessive amount. The judgments make it clear, however, that the result would have been the same even if the payment of that sum had been refused, because the unsuccessful demand for the costs of underwriters was enough by itself to vitiate the second petition arising out of the same transaction.

Lord Hanworth M.R. in his judgment said this [4]: " . . . there " is a principle which must be jealously guarded—namely, that " the process of the Bankruptcy Court must not be abused. A " number of cases have established that. In *In re Otway* [5] the " petitioning creditor endeavoured to obtain £25 from a debtor " as a condition for agreeing to adjournment of the petition. The " attempt failed; but although the petitioning creditor did not

[3] [1928] Ch. 199.

[4] Ibid. 206.

[5] [1895] 1 Q.B. 812.

"succeed the Court held that he had attempted to extort money "from the debtor for his own purposes, and it declined to allow "him to have the advantage of using the process of the Court "in Bankruptcy against the debtor. That is a case where an "unsuccessful attempt was made, and yet the creditor was "debarred from making use of bankruptcy proceedings." He then cited other authorities, into which I need not look. He came to the conclusion that the subsequent petition was vitiated because it arose out of the same transaction as the first petition and would thus afford countenance to an attempt at extortion. If that be right, I think it justifies the statement in Williams on Bankruptcy, 16th ed., p. 68, in the notes to section 5 of the Bankruptcy Act, 1914, in these words: "It seems, therefore, "that a creditor once guilty of even attempted extortion is "precluded from taking bankruptcy proceedings in respect of "the same debt." I do not say this by way of a review of the registrar's decision, but because I have to consider whether, from a bankruptcy point of view, there was what is called extortion.

Of course, in many of these cases there is extortion in the ordinary sense—unconscionable demands of various kinds—but the term in bankruptcy has a wider meaning and includes matters in which little, if any, moral obliquity is involved. In this case the solicitors demanded the sum of costs because they were ignorant of bankruptcy rule or bankruptcy practice, and I do not accuse them or their clients of any great moral obliquity, and nobody suggested that there was any. The principle exists nevertheless that the threat of the penal sanction of bankruptcy must not be used to obtain a collateral advantage of any kind. The payment of this 12 guineas was such an advantage, and the position seems to be the same whether the attempt to obtain the advantage succeeds or no.

It follows that this debt cannot be enforced by a bankruptcy petition. The creditor seems to have recognized that; he did not appeal against the registrar's decision, but he comes now under another jurisdiction, namely, that under section 5 of the Debtors Act, 1869. By section 5 of the Debtors Act the court has a discretionary power to commit to prison a person who makes default in payment of a debt, and under section 5 (2) that jurisdiction is only to be exercised when it is proved to the satisfaction of the court that the person making default either has or has had since the date of the judgment means to pay the sum. That jurisdiction was originally committed to the

Court of Queen's Bench by the Act, but, by an order issued by the Lord Chancellor on January 1, 1884 (see Williams on Bankruptcy, p. 864), the jurisdiction under section 5 was assigned to the bankruptcy judge, where it now remains except in respect of the orders of the Divorce Court, which, by the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932, were reserved to that court itself. It is, therefore, in a sense an accident that the court sitting in bankruptcy has to adjudicate on these judgment summonses. Nevertheless, they are a form of execution which requires the sanction of the court before it can be exercised. They are obviously related therefore to the procedure by way of bankruptcy notice and petition. That is emphasized, as Mr. Duveen pointed out to me, by section 107 of the Bankruptcy Act, 1914, which repeats the authority to the Lord Chancellor to direct that jurisdiction under the Act be vested in the bankruptcy judge. In subsection (4) of that section there is a power for the court, where the creditor consents to it, to refuse to make a committal order and to make a receiving order instead. The subsection provides: "In such case the judgment "debtor shall be deemed to have committed an act of bankruptcy "at the time the order is made, and the provisions of this Act "except Part VII shall apply." That means that by a side-wind a bankruptcy petition could arise out of this debt under the jurisdiction exercised under the Debtors Act, although by the direct route no bankruptcy petition could avail this creditor. It was argued that the decisions of the court relating to the process of bankruptcy must apply equally well to the process by judgment summons; that the threat of committing a man to prison by means of a judgment summons must not be used to put pressure on him to pay more than he is bound to pay and that, once such a threat has been used, the court will not give its assistance by judgment summons any more than it will on a bankruptcy petition.

It seems to me that I am bound to hold that this act is one of which the Court of Bankruptcy, in its bankruptcy jurisdiction, would disapprove, and that logically I am also bound to exercise the jurisdiction under section 5 of the Debtors Act in the same sense, and to hold that the vice which would bar a petition in bankruptcy also bars a judgment summons. It is not, I think, that I have no jurisdiction to make the order on the summons, as was submitted to me; but, in the exercise of my discretion, and guided by the analogy of bankruptcy authorities which are binding on me, I ought to hold that this is a relief to which this creditor has disentitled himself, and I so hold. I therefore dismiss the summons.

Summons dismissed.

Solicitors: *Hewitt, Woollacott & Chown; Isadore Goldman & Son.*

I. G. R. M.

NEWSOM *v.* ROBERTSON (INSPECTOR OF TAXES).

C. A.

1952

July 24, 30; *Oct.* 13.

Somervell, Denning and Romer L.JJ.

Revenue—Income tax—Profits of profession—Expenses—Practising barrister—Travelling expenses between home and chambers—Whether deductible—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I and II, r.* 3 (*a*).

Schedule D to the Income Tax Act, 1918, provides by r. 3 of the Rules applicable to Cases I and II, that in computing the amount of the profits or gains of a profession to be charged to income tax, "no sum shall be deducted in respect of—(*a*) any disbursements or "expenses not being money wholly and exclusively laid out or "expended for the purposes of the . . . profession. . . ."

N, a member of the Chancery Bar, had chambers in Lincoln's Inn and a family residence at Whipsnade, at which latter place he kept a set of law reports and also legal textbooks. Much of his professional work was advisory. During term time it was his habit to work in chambers or in court during the day, and in the evening to take papers home, and there frequently to work for several hours after dinner. During vacation he rarely went to chambers, except for conferences, but papers were sent to him at his home. The annual cost of travelling by rail between his home and chambers was £137 and this sum he claimed to deduct from his assessment.

Held, that the expenses of travelling between London and Whipsnade were not incurred wholly and exclusively for the purposes of his profession, and were therefore not deductible

Decision of Danckwerts J. [1952] W.N. 256 affirmed.

APPEAL from Danckwerts J.[1]

The taxpayer, a member of the Chancery Bar, had chambers in Lincoln's Inn, and a family residence at Whipsnade, where he kept a set of law reports and also other legal textbooks. Much of his professional work was advisory. During term time it was his habit to work in London, in chambers or elsewhere, e.g., in

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[1] [1952] W.N. 256.

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court, during the day, and in the evening to take papers home and work, frequently continuing to do so for some hours after dinner. During vacation he did a great deal of work at home, whither papers were sent to him by post, and rarely went to chambers, doing so only for conferences. The annual cost to him of travelling between his home and his chambers was £137, and this sum he claimed to deduct from the profits of his profession as expenses wholly and exclusively expended for the purposes of his profession.

The special commissioners held that the expenses of travelling between Whipsnade and London during term time were not expenses wholly and exclusively laid out for the purposes of the taxpayer's profession and were not deductible from his taxable income; but that such expenses incurred during vacations were deductible, the basis of the barrister's operations having changed from London to Whipsnade.

On appeal, Danckwerts J. disallowed the deduction of any of the expenses. The barrister, he said, had chosen to live at Whipsnade because he liked living in the country and wished to enjoy its amenities. On any view, therefore, travelling between Whipsnade and Lincoln's Inn was due partly to the calls of his profession and partly to the requirements of his existence as a person with a wife and family and a home. It followed that the expenses of that travelling were not incurred wholly and exclusively for the purposes of his profession.

The taxpayer appealed.

Millard Tucker Q.C., *J. W. P. Clements* and *L. Abel-Smith* for the taxpayer. The decision in this appeal may be of considerable importance not only to members of the Bar but to other professional persons. There is a distinction to be drawn between cases under Schedule D and Schedule E. This case comes under Case II of Schedule D. Under rule 9 of Schedule E only expenses wholly and exclusively and of "necessity" expended in the course of an employment of profit can be deducted. An employment is a very different thing from a profession. There is no such word as "necessarily" or "reasonably" in rule 3 (*a*) of Case II of Schedule D.[2] If you are carrying on a profession you can incur any expense you choose provided it is "wholly and "exclusively" incurred for the purposes of the profession. The Revenue has no power under Schedule D to look to see what expense was reasonable or necessary (*per* Lord Wright in *Craddock* v. *Zevo Finance Co. Ld.*[3]). All that is taxable is the profit which arises on the exercise of the profession. By rule 3 (*a*) no sum shall be deductible in respect of money "not wholly "and exclusively laid out or expended" for the purposes of the taxpayer's profession. It is not part of the commissioners' duty to decide what is necessary: see *Bentley Stokes & Lowless* v. *Beeson.*[4]

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[2] Income Tax Act, 1918, Sch. D, Cases I and II, r. 3: "In computing "the amount of the profits or gains "to be charged, no sum shall be "deducted in respect of (*a*) any disbursements or expenses, not being "money wholly and exclusively laid "out or expended for the purposes of "the trade, profession, employment, "or vocation; (*b*) any disbursements

By paragraph (*e*) of rule 3 "any loss not connected with or "arising out of the trade, profession," etc., is not deductible. The journeys between Whipsnade and the taxpayer's chambers in London were clearly for the purpose of enabling him to carry on his profession. Even if the judge has found that these expenses have never been allowed before, and might lead anywhere, it is not conclusive, nor does there appear to be any authority for his opinion. A Scottish barrister has no chambers. He conducts his business at home or in the library, and if he has to attend in the House of Lords and thereby incurs travelling expenses, it would be surprising if the Revenue refused to allow him to deduct those expenses. The statement of the learned judge is too wide. You cannot lay down a general principle but must answer the question on the facts of each particular case. Every case depends upon how the taxpayer does and allocates his work—whether it will involve him in extra expense. A "study allowance" has been granted under rule 3 (*c*). A great many of the apparent difficulties are swept away if it is recognized that the taxpayer's profession is such that it can only be carried out by his personal attendance; that it is a profession which is

"or expenses of maintenance of the "parties, their families or establish- "ments or any sums expended for "any other domestic or private pur- "poses distinct from the purposes of "such trade, profession, employment "or vocation; (*c*) the rent or annual "value of any dwelling-house or "domestic offices or any part thereof, "except such part thereof as is used "for the purposes of the trade or "profession: Provided that where "any such part is so used, the sum "so deducted shall be such as may "be determined by the commis- "sioners, and shall not, unless in "any particular case the commis- "sioners are of opinion that, having "regard to all the circumstances, "some greater sum ought to be "deducted, exceed two-thirds of the "annual value or of the rent bona "fide paid for the said dwelling- "house or offices."

[3] (1946) 27 Tax Cas. 267, 290.

[4] [1952] 1 T.L.R. 1529, 1531, 1533.

not, and need not be, attached to one place; and that it is a question of fact entirely whether, when he is at a particular place, he is there, and is using that place, as an exercise of his profession. The question cannot be put in a general way because it depends upon which way a particular person exercises his profession. A taxpayer is entitled to eliminate the full expense incurred in earning the profits of his profession.

[Romer L.J. Having taken a place as your family home can you say that the expenses of travelling between it and your chambers are wholly and exclusively for the purposes of your profession?]

If a barrister has chambers in a different place and he has to travel between them and his home it is an act done in the exercise of his profession. Once the commissioners had decided that Mr. Newsom had two places of work it is inconsistent to say that travelling between them has a dual purpose. The question is: had he a business purpose when he made the journey to London and back again? It is submitted that he had and that it was for professional reasons. If it is an act done for the purpose of exercising your profession then you are entitled to an allowance notwithstanding that it serves another purpose. It is the purpose for which you are doing the act which matters. [*Strong & Co.* v. *Woodifield*[5] and *Smith's Potato Estates Ld.* v. *Bolland*[6] also referred to.]

Heyworth Talbot Q.C. and *Sir Reginald Hills* for the Crown. The whole question is whether or not in the circumstances of the case this outlay represents disbursements made wholly and exclusively for the purposes of Mr. Newsom's profession. In order to solve that question it is necessary to determine what is meant by "purposes of the profession." What was the purpose of his going home? True, Mr. Newsom had the intention when he got home of doing some work after dinner, but to say that he was going home for the purpose of working would be a misuse of language. The need to do further work in the evening was not the dynamic urge which caused him to go back each night. He could have done the work in his chambers, but he wished to go home to dine and see his wife and family. There is no question of a duality of purpose, and the commissioners were wrong in their analysis.

[Denning L.J. How about the journeys in the mornings?]

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[5] [1906] A.C. 448, 453.

[6] [1948] A.C. 508.

You cannot separate the two journeys. The fact that he has to go back to his inn next morning is a consequence of his intention to go home in the evening. His base of professional operation is Lincoln's Inn, and therefore this case is distinguishable from the case of a solicitor having offices in two towns. The fact that a barrister had two places in which he found it convenient to work is not sufficient to establish that the cost of travelling between them was wholly and exclusively expended for the purposes of his profession. The establishment of two places of work is not something forced on Mr. Newsom by the exigencies of his profession, but is for his convenience.

[DENNING L.J. When income tax was first imposed very many people lived over their place of business or profession. Now, so many people cannot find accommodation and have to live out of London.]

The conception of the principle is that the disbursement is wholly and exclusively for the purpose of the profession. Where a solicitor has an office and practice in London he does not open an office in, say, Reading, just because he wishes to live at Reading, but because he thinks he can obtain an additional practice there. He makes the choice for professional reasons. That is a proper line case in which the commissioners would have to consider what was the real purpose of the Reading office. That is not this case.

[SOMERVELL L.J. suggested that travelling lecturers came within the peripatetic principle.]

There are many cases in which travelling expenses are allowed, but it is hard to define where they begin. If Mr. Millard Tucker is right why should not a barrister establish his home in the Lake district and fly up to London two or three days a week? It would be going a very long way to suggest that a professional man with a practice in London is entitled to locate himself two or three hundred miles away and claim to deduct his travelling expenses because it is found that he does a lot of work at home.

[SOMERVELL L.J. The commissioners have found that in the vacations Mr. Newsom's permanent base as a barrister is at Whipsnade? Why should they not be entitled to find that?]

They were not entitled to find that because there was not anything in the facts to distinguish the motive of Mr. Newsom on July 31 from his motive at other week-ends. His motive was the same—not to go and locate his profession somewhere else but to go to his home. If they mean that there has been a real transfer of the location of practice they are in error, for there is

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on the facts no justification for such an inference. On the facts previously found by the commissioners the professional base of Mr. Newsom as a barrister is in London, and the fact that he does work at home during the vacation does not entitle it to be said that the basis of his work has changed. It would be just as logical to say that every week-end or night his professional base has shifted from Lincoln's Inn to Whipsnade. It is submitted, with a great deal of personal reluctance, that this appeal should not be allowed.

Tucker Q.C., in reply. Mr. Talbot has emphasized that living at Whipsnade was Mr. Newsom's choice. Of course it was. It was also his choice to work in chambers at Old Square. Therefore that argument does not lead anywhere because in fact he carries on his business in two places, and the only question is whether he is entitled to deduct the cost of travelling one way or the other. The court should look at the profession as an entity, and the question is what is the profit which emerges from it. The motive for some expenses must be looked at in order to ascertain whether they are for a dual purpose; but other expenses are not so looked at, because there is a dual purpose in almost every expense and the result would be that no expenses could be deducted. There can, however, be expenses which, if you show that they are the necessary consequence of carrying on your business, are allowed without inquiry as to whether there is a dual purpose. The result of the finding of the commissioners is that Mr. Newsom has a profession carried on at two places, which necessitated the expense of travelling between them. If he is called up to London during vacation time that clearly is an expense which should be allowed.

Cur. adv. vult.

October 13. The following judgments were read:—

SOMERVELL L.J., having stated the facts and read rule 3 (*a*), (*b*) and (*c*) of the Rules applicable to Cases I and II of Sch. D, continued:—The special commissioners, I think rightly, posed the question whether this expenditure was "money wholly "and exclusively laid out or expended for the purposes of his "profession."

On the facts, which are elaborated in the Case, the commissioners found that Mr. Newsom exercised his profession partly at 15 Old Square and partly at the Old Rectory, Whipsnade. They then proceed to consider the purpose or purposes of the journey, and I will read paragraph 12 (6) of the Case: "We must "now examine, in the light of the evidence, the 'purpose' or "'purposes' of the various journeys the expenses of which are "claimed as deductions. Dealing first with the journeys under"taken during term time, we think it convenient to start with "those which are undertaken in the evening from Old Square "to the Old Rectory. What is the 'purpose' of these journeys? "On the evidence, we find that the purpose is a dual one, "namely, (a) to eat, sleep and pursue his domestic avocations, "generally, in his 'home' there, and (b) to do further profes"sional work in his 'place of business' (namely his study) "there. Is this dual 'purpose' one which can properly be said "to be 'wholly and exclusively' for the purposes of his profes"sion as a barrister? On the facts of this case we regard (a) "not as something merely incidental or subsidiary to (b), but as "a substantive 'purpose' in itself, for which he would make "the journey even if (b) were not combined with it. We are "unable, therefore, to regard the expense of this journey as "incurred 'wholly and exclusively' for the purposes of his pro"fession. (7) Next, we consider the purpose of the journey "from the Old Rectory to Old Square the following morning. "On the evidence we are of opinion that he leaves the Old "Rectory qua 'home' and only incidentally qua 'place of "'business'; and that a substantive 'purpose' of the journey "is to proceed from his 'home,' as such, to the place of business "where he intends to commence his professional work for the "day. We cannot regard this journey as undertaken wholly and "exclusively for the purposes of his profession."

Though I agree with the conclusion, I doubt if it is helpful to consider the journeys separately. It is the expenses of going to and fro which have to be considered. It would be an impossible result to hold that one journey was "wholly and exclusively" and the other not.

Mr. Tucker, for Mr. Newsom, based his argument naturally on the finding that Mr. Newsom's profession was exercised partly at the Old Rectory. Many examples were given in the course of the argument, but the following would be, I think, a fair example of the type of case to which Mr. Tucker would assimilate the present. A professional man, say a solicitor, has two places of business, one at Reading and one in London. He normally sees clients and does his professional work at Reading up till noon and then comes to London. He may live at Reading or in London or at neither. I would have agreed with Mr. Tucker

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that the journeys to and fro between Reading and London were deductible within the rule. He is carrying on one profession partly in London and partly at Reading. It is therefore necessary to examine in the light of the facts what is meant by the finding that he exercises his profession at the Old Rectory and what are the implications of the fact that the Inland Revenue have recognized that he uses a room there for the purposes of his profession.

One thing is quite clear, namely, that Whipsnade as a locality has nothing to do with Mr. Newsom's practice. That differentiates it from the case of the solicitor which I have put. If he had found a house that suited him in Hertfordshire or Oxfordshire, everything would have gone on in precisely the same way. There is, I think, force in Mr. Talbot's criticism of the form of the commissioners' finding in the Crown's favour, which I have read, namely, that there was a dual *purpose*. Mr. Newsom's purpose in making the journeys was to get home in the evenings or at week-ends. The fact that he intended to do professional work when he got there, and did so, does not make this even a subsidiary "purpose" of his profession. An author who has to go to the seaside to recuperate may write an article while he is there, but in ordinary language that was not the purpose of the journey. He was exercising his profession there, but some authors who do not depend on libraries or local colour can do that anywhere. The places where they exercise their profession would be irrelevant to their profession and I cannot see how the cost of moving from one to the other could be said to be wholly and exclusively laid out for the purpose of their profession. It would be laid out because the author found it pleasant to have, say, two homes. The position would not, I think, be affected by the fact that the author might be entitled to a study allowance in one or perhaps both of his homes. The conclusion of the special commissioners with regard to the expenses in term time seems to me to be right in law. I would myself have doubted whether the journeys to and fro were for the purposes of the profession in any sense. If they were, then in my opinion they were a second and subsidiary purpose.

The commissioners distinguished the vacations on the ground that Mr. Newsom, who did a considerable volume of work in the vacations, normally resided at Whipsnade and only occasionally came up to London to his chambers. They therefore held that Whipsnade became his professional base, his chambers being like a branch office. The learned judge rejected this contention. The commissioners accepted that a practising barrister need not have chambers and can carry on his profession anywhere he pleases. That is unusual in London, at any rate, and anyhow is not this case. Mr. Newsom had chambers in Lincoln's Inn. They remained open in the vacation. I think they remained his professional base although for his own convenience he had papers sent down from there, or possibly, on instructions direct by solicitors, to Whipsnade. The learned judge held that the position throughout the period of assessment must be taken as a whole. So far as this case is concerned I agree. There might, of course, be cases where quoad travelling expenses the position for one period of the year might differ from the rest of the year. The learned judge based his decision on what I may call the principle of a dual purpose. He had the authority for that principle not only in the words "wholly and exclusively" but in a statement in a judgment of this court in *Bentley, Stokes & Lowless* v. *Beeson.*[7] I agree with the learned judge's reasoning though, as I have stated, I doubt whether the taxpayer in the present case reaches this stage. I therefore would dismiss the appeal.

Denning L.J. In the days when income tax was introduced, nearly 150 years ago, most people lived and worked in the same place. The tradesman lived over the shop, the doctor over the surgery, and the barrister over his chambers, or, at any rate, close enough to walk to them or ride on his horse to them. There were no travelling expenses of getting to the place of work. Later, as means of transport quickened, those who could afford it began to live at a distance from their work and to travel each day by railway into and out of London. So long as people had a choice in the matter—whether to live over their work or not—those who chose to live out of London did so for the purposes of their home life, because they preferred living in the country to living in London. The cost of travelling to and fro was then obviously not incurred for the purpose of their trade or profession.

Nowadays many people have only a very limited choice as to where they shall live. Business men and professional men cannot live over their work, even if they would like to do so. A few may do so, but once those few have occupied the limited accommodation available in Central London, there is no room for the thousands that are left. They must live outside, at distances

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[7] [1952] 1 T.L.R. 1529.

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varying from three miles to 50 miles from London. They have to live where they can find a house. Once they have found it, they must stay there and go to and from it, to their work. They simply cannot go and live over their work. What is the position of people so placed? Are their travelling expenses incurred wholly and exclusively for the purposes of the trade, profession or occupation? I think not. A distinction must be drawn between living expenses and business expenses. In order to decide into which category to put the cost of travelling, you must look to see what is the base from which the trade, profession, or occupation is carried on. In the case of a tradesman, the base of his trading operation is his shop. In the case of a barrister, it is his chambers. Once he gets to his chambers the cost of travelling to the various courts is incurred wholly and exclusively for the purposes of his profession. But it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purposes of his living there and not for the purposes of his profession, or at any rate not wholly or exclusively; and this is so, whether he has a choice in the matter or not. It is a living expense as distinct from a business expense.

On this reasoning I have no doubt that the commissioners were right in regard to Mr. Newsom's travelling expenses during term time. The only ground on which Mr. Millard Tucker challenged their finding during term time was because Mr. Newsom has a study at his home at Whipsnade completely equipped with law books and does a lot of work there. The commissioners did not regard this as sufficient to make his home during term time a base from which he carried on his profession, and I agree with them. His base was his chambers in Lincoln's Inn. His home was no more a base of operations than was the train by which he travelled to and fro. He worked at home just as he might work in the train, but it was not his base. The commissioners found, however, that during the vacation his professional base was not at his chambers in Lincoln's Inn but at his home at Whipsnade. I do not think this was a correct inference from the facts before them. His professional base was throughout in Lincoln's Inn, and it did not cease to be so simply because he rarely went there during the vacation. For these reasons I agree that the appeal should be dismissed.

Romer L.J. I agree that the appeal must be dismissed. In order that the taxpayer's expenses of travelling to and fro between

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Whipsnade and London should qualify for tax purposes as permissible deductions from his gross earnings as a barrister, it must be shown that they were incurred wholly and exclusively for the purposes of his profession. This general test involves the following questions, namely, (1) Were the expenses incurred for the purpose of enabling the taxpayer to carry on and earn profits in his profession? (*per* Lord Simonds in *Smith's Potato Estates Ld.* v. *Bolland*[8]), and (2) if so, were they exclusively so incurred? Unless an affirmative answer can be given to each of these questions the expenses cannot be said to fall within the only exempting provision which is relevant to this appeal, namely, rule 3 (*a*) of the Rules applicable to Cases I and II of Sch. D to the Income Tax Act, 1918.

It is, of course, true that on days when Mr. Newsom has to appear in court in the Chancery Division the expense of his journey to London from Whipsnade is incurred for the purpose of enabling him to practise his profession, in the sense that if he did not come to London he could not earn his brief fee. But if this view of the position were sufficient to justify the deduction of his fares to London for income tax purposes, every taxpayer in England whose profits are assessable under Sch. D could claim as a permissible deduction his expenses of getting from his place of residence to his place of work. On the other hand, it could scarcely be argued that the cost of going home at the end of the day would be similarly eligible as a deduction, and it would be a curious result of rule 3 that the morning journey should qualify for relief but that the evening journey should not. Mr. Newsom, in a letter to the Inspector of Taxes, frankly disclaimed any right to relief founded merely on the ground of having to proceed from his home to his place of work, and conceded that a man's "profession is not exercised until he arrives at the place at "which it is carried on." In my judgment this proposition is, in general, true. Moreover, it cannot be said even of the morning journey to work that it is undertaken in order to enable the traveller to exercise his profession; it is undertaken for the purpose of neutralizing the effect of his departure from his place of business, for private purposes, on the previous evening. In other words, the object of the journeys, both morning and evening, is not to enable a man to do his work but to live away from it.

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[8] [1948] A.C. 508, 517; 30 Tax Cas. 267, 292.

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Is the position altered, then, by the fact, as found by the commissioners, that Mr. Newsom works in his house at Whipsnade as well as in his chambers in Lincoln's Inn? I am clearly of opinion that it is not. It seems to me impossible to say that this element assimilates the case to that of a man who possesses two separate places of business and, for the furtherance and in the course of his business activities, has to travel from one to another. Mr. Newsom could, if he liked, carry on the whole of his profession in London—though he certainly could not do so at Whipsnade, if only for the reason that the courts of the Chancery Division do not sit there. It seems to me accordingly that it is almost impossible to suggest that when he travels to Whipsnade in the evenings, or at week-ends, he does so for the purpose of enabling him "to carry on and earn profits in his" profession—let alone that he does so exclusively for that purpose. That purpose, as I have said, could be fully achieved by his remaining the whole of the time in London. He goes to Whipsnade not because it is a place where he works but because it is the place where he lives and in which he and his family have their home. Even busy barristers occasionally have an evening free from legal labour, and I feel sure that if Mr. Newsom were lucky enough to have one he would not remain in London on the ground that there was no work to take him to Whipsnade. As a result of these various considerations, it seems to me that neither of the questions to which I have referred in connexion with the test which has to be applied in claims such as the present permits of an affirmative answer; and, in these circumstances, the appeal cannot, in my judgment, be sustained.

In the above observations I have drawn no distinction between term time and vacation, and I agree with the grounds on which the learned judge based his view that the same considerations apply to both.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Darley, Cumberland & Co.; Solicitor of Inland Revenue.*

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BRITISH NYLON SPINNERS LD. *v.* IMPERIAL CHEMICAL INDUSTRIES LD.

[1952 B. No. 3747.]

International law—Jurisdiction—English contract to grant patent licences—Order by foreign court directing cancellation of rights under English contract—Injunction preventing obedience to foreign court order—Extraterritorial jurisdiction.

The defendants, an English corporation, were ordered by a foreign court, to whose jurisdiction they were subject, to cancel an existing agreement with a foreign company and to reassign to that company certain patents and rights thereunder previously assigned to the defendants for registration in the United Kingdom. They were also forbidden by the same order to make any disposition of the assigned patents unless they obtained from the grantee under such disposition an undertaking to hold them subject to a condition which involved the free import into any country—including the United Kingdom—of goods manufactured in accordance with the assigned patents.

Prior to the making of the order of the foreign court, the defendants had entered into a contract in England with the plaintiffs, an independent English corporation not subject to the jurisdiction of the foreign court, to grant them licences to exercise and practise all the inventions covered by the assigned patents within defined territories. At the date of the said order, the patents had not been formally registered, and no licences had been granted under the English contract.

After the making of the said order, the plaintiffs issued a writ against the defendants, requiring specific performance of their contract, and asked for an injunction to restrain the defendants from reassigning the patents in obedience to the foreign court order. Upjohn J. granted an interlocutory injunction until judgment in the action or further order.

On appeal by the defendants:—

Held, continuing the injunction, that in so far as the foreign court order asserted an extraterritorial jurisdiction, the effect and intention of which was to destroy or qualify statutory rights under an English contract vested in an English national who was not subject to the jurisdiction of the foreign court, the courts would not, despite the comity of nations, recognize such extraterritorial jurisdiction and would intervene to restrain the defendants from obeying the order.

Decision of Upjohn J. affirmed.

INTERLOCUTORY appeal from Upjohn J.

By an agreement made on December 31, 1946, the defendants, Imperial Chemical Industries Ld. and an American corporation, du Pont de Nemours & Co. Inc., the latter agreed to assign to the

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[Reported by Miss M. M. HILL, Barrister-at-Law.]

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defendants certain patents and applications for patents scheduled to the agreement, such assigned patents to be registered as British patents in the United Kingdom.

On March 5, 1947, the defendants entered into a contract in England with the plaintiffs, British Nylon Spinners Ld., an English corporation. The plaintiffs claimed that under this contract they had a licence or the right to be granted a licence to exercise and practise within a defined field all the inventions covered by the patents and applications for patents in the schedule to the agreement of December 31, 1946, between the defendants and the American corporation.

In June, 1952, the plaintiffs asked the defendants' solicitors to execute formal licences under the assigned patents to enable the plaintiffs to register them, and were informed that, owing to the existence of legal proceedings in the United States, the defendants could not execute any documents relating to the patents in question.

On July 30, 1952, in the United States District Court of New York, his Honour Sylvester J. Ryan delivered a final judgment in an action brought by the United States of America against the defendants, du Pont de Nemours & Co. Inc., and others under the anti-trust law known as the Sherman Act: *United States of America* v. *Imperial Chemical Industries Ld. and Others.*[1] The plaintiffs were not parties to those proceedings.

By a clause in that judgment the United States court ordered that the agreement of December 31, 1946, between the defendants and du Pont de Nemours & Co. Inc. be cancelled, and that the defendants should reconvey within 90 days all the patent rights assigned to them under that agreement.

Other clauses in the judgment[2] forbade any disposition of foreign patents by the defendants unless they obtained from the grantee an undertaking in writing to hold licences subject to the right of American manufacturers to import goods manufactured in accordance with the patents freely into any foreign country.

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[1] U.S. District Court for the Southern District of New York [1952] Civil Action No. 24–13.

[2] "IX. Patents and Technology.
"(4) Until June 30, 1977 . . . du "Pont and ICI shall (*a*) grant to any "person (including du Pont and ICI) "making written request therefor, "in consideration of a reasonable "royalty, an unrestricted, non-exclu-"sive immunity under any foreign "counterpart of any existing or new "patent to import into any foreign "country any common chemical pro-"duct lawfully manufactured in the "United States. . . ."
"(13) Du Pont and ICI shall not ". . . (*b*) make any disposition of "foreign patents or rights there-"under, which deprives them of the "power or authority to issue the "grants of immunity required by this "judgment, unless the defendant "requires in writing . . . that the "purchaser, assignee or licensee "agrees to receive and hold its rights "subject to any grant or grants of "immunity given by the defendant "pursuant to the provisions of this "judgment. . . ."

The plaintiffs thereupon issued a writ claiming declarations as to their rights to licences, and asking for an order that the defendants should execute formal grants of those licences, and for specific performance of the contract of March 5, 1947. They also asked for an injunction to restrain the defendants from assigning or dealing with or parting with any of the patent rights in question in obedience to the order of the United States court.

On August 13, 1952, Upjohn J. granted an interlocutory injunction to restrain the defendants from assigning the patents until judgment or further order.

The defendants appealed.

Rodger Winn for the defendants. The English patents assigned to the defendants by the agreement of December, 1946, would give them the right to keep out of the United Kingdom articles manufactured in accordance with the patents. The intended effect of the judgment is to forbid the defendants in personam from exercising that right; and if they do so they will be amenable to penalties for contempt of court.

[Evershed M.R. The American court assumes jurisdiction in personam against a party amenable to its jurisdiction to compel it by contract to modify the rights which the law of another country confers on it in that other country. Moreover, the order is to take effect notwithstanding the plaintiffs' rights. If they have in equity a right to specific performance against the defendants, does not the order in form purport to interfere with the municipal law of England? We may have to consider to what extent we concede on grounds of the comity of nations extraterritorial jurisdiction to interfere with English patent rights.]

That puts the case very forcefully and may make my submissions irrelevant. It is submitted:

(1) It is a general principle of English law that if one man has granted or agreed to grant a right to another in respect of some particular property, whether real or personal, and is evicted by title paramount before performance, he will either be free of his obligation or at the least it cannot be specifically enforced

against him; a bailee is for instance free from obligation to a bailor if goods are taken from him by title paramount.

(2) The English courts will refrain from ordering a party to a contract to do anything illegal by the proper law of the contract, which, it is submitted, is here American law. The obligation on the defendants does not arise merely ex contractu but has been imposed on them by a court of competent jurisdiction to which jurisdiction they are subject by virtue of their contract with the American company.

[Denning L.J. But the order overrides and cancels the contract. The American court would assume jurisdiction even if the contract were governed by English law!]

Yes; it is conceded that the order tears up and abrogates the whole contract; it does not enforce a contract either specifically or by a grant of damages.

[Romer L.J. It may be that another principle applies, namely, that these courts will pay no regard to the operation in this country of any foreign law of a confiscatory nature. The American court order has confiscated without compensation the right at present vested in the plaintiffs to come and ask for specific performance. Though they might get monetary damages, such damages might not be proper compensation.]

If the effect of the American order be that persons taking a licence under these patents will take it free from the rights already granted to the plaintiffs, it would be confiscatory to that extent: see *New Ixion Tyre and Cycle Co.* v. *Spilsbury.*[3]

(3) The defendants have only contracted to grant licences and by implication not to assign the patents away before doing so. They have not contracted not to assign the patents nor to remain indefinitely entitled nor that their title as assignees would remain unassailable. No authority is needed for this submission.

[Evershed M.R. The court is anxious to show proper respect for a superior court of a friendly nation which is attempting to enforce its own proper legislation. It might be opportune to vary the order of Upjohn J. to apply in the event of steps being taken against the defendants in New York.]

The American courts expressed a similar desire to show respect for these courts. But if the court holds that there is something amounting to confiscation, it would be in accordance with traditional practice not to give effect to that part of the foreign judgment. This is only an interlocutory step, and it may be that the status quo should be preserved, for once the patents have been reassigned the position cannot be remedied vis-à-vis the plaintiffs save by money, which, it is conceded, may not be proper compensation.

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[3] [1898] 2 Ch. 137.

T. G. Roche for the plaintiffs. As for the purposes of this motion the existence of the contract between the parties is conceded, the plaintiffs have established a prima facie case that a breach is intended. The plaintiffs' contract is one made between two English companies in England, and its proper law is English. Under it the plaintiffs have equitable rights in English patents enforceable against the world if there be notice of them. Indeed, there are remarks obiter by a judge of this court that they may even be legal rights, but in view of the registration provisions, and the fact that at the time of the American court's order the patents were not registered here, that question is not clear beyond doubt. It is, however, clear that the plaintiffs have an enforceable right against the present defendants.

[Evershed M.R. Can the plaintiffs protect themselves by registering notice under the Patent Acts or by registering this action as a "lis pendens"?]

No; there must be an instrument to register. It was an implied term of the contract that the defendants would not put it out of their power to grant a licence. The defendants are now threatening to get rid of the legal estate and receive back a licence with conditions attached. They are thus clearly in breach, or are threatening breach, of their contractual duties. If they assign the patents to the American company the plaintiffs' rights will be gone for ever.

An Act of a foreign legislature—here the Sherman Act of Congress—cannot have extraterritorial effect in this country so as to deprive English subjects of their rights under English contracts with other English subjects. A fortiori, an order of one of the courts of that foreign country cannot affect the plaintiffs' rights in England.

[Evershed M.R. I am not satisfied that the present injunction should extend, e.g., to Australia or any other country covered by agreement between the plaintiffs and defendants. You may have to proceed in all those countries.]

The plaintiffs at present have no rights in any other country, but only a contractual right in England to specific performance by the defendants. So far as the contractual rights outside England are concerned, the court presumes that the law of those other countries is the same as that of England, until the contrary is proved.

It is submitted that, if the injunction in its present form is continued, the English courts can investigate all the relevant matters; if not, the patents will have gone to an American corporation in no way subject to the court's jurisdiction. The only obstacle to maintaining the status quo is the order of the American court.

The provision in the judgment as to the applicability of the judgment [4] was intended to cover the present eventuality. The judge there used the words "U.S. Government" as meaning "State"; an Act of the general law forbids the defendants from doing an act, and the court of competent jurisdiction in England says that they shall not forbid it. The latter is thus "an action "taken in compliance with the law" of this country, and therefore it cannot be intended to proceed against the defendants for that action. The injunction should be continued without variation.

Winn replied.

EVERSHED M.R. stated the facts and continued:—This is an interlocutory matter, and, therefore, it is inappropriate for the court to say more about the case, or the merits of the case, than is necessary to make clear the grounds of the conclusion which it reaches. It is plain that there is here a question of the comity which subsists between civilized nations. In other words, it involves the extent to which the courts of one country will pay regard and give effect to the decisions and orders of the courts of another country. I certainly should be the last to indicate any lack of respect for any decision of the district courts of the United States. But I think that in this case there is raised a somewhat serious question, whether the order, in the form that it takes, does not assert an extraterritorial jurisdiction which the courts of this country cannot recognize, notwithstanding any such comity. Applied conversely, I conceive that the American courts would likewise be slow (to say the least) to recognize an assertion on the part of the British courts of jurisdiction extending (in effect) to the business affairs of persons and corporations in the United States.

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[4] "3. No provision of this judgment shall operate against ICI for "action in compliance with any law "of the United States Government or "of any foreign government or instrumentality thereof to which ICI is "at the time being subject and concerning matters over which under "the law of the United States such "foreign government or instrumentality thereof has jurisdiction."

C. A.
1952

British Nylon Spinners Ld. v. Imperial Chemical Industries Ld.

Evershed M.R.

Having said that much, I must make one reference to a passage in the second of the opinions which his Honour delivered, dated May, 1952. It is plain that the judge considered this matter most carefully, and indeed, as Upjohn J. pointed out, expressed his own doubts whether, in giving effect, as he felt it his duty to do, to the implications of the Sherman Act, he might not be going beyond the normally recognized limits of territorial jurisdiction. He said: "It is not an intrusion on the authority of "a foreign sovereign for this court to direct that steps be taken to "remove the harmful effects on the trade of the United States." If by that passage the judge intended to say (as it seems to me that he did) that it was not an intrusion on the authority of a foreign sovereign to make directions addressed to that foreign sovereign or to its courts or to nationals of that foreign Power effective to remove (as he said) "harmful effects on the trade "of the United States," I am bound to say that, as at present advised, I find myself unable to agree with it.

Questions affecting the trade of one country may well be matters proper to be considered by the government of another country. Tariffs are sometimes imposed by one country which obviously affect the trade of another country, and the imposition of such tariffs is a matter for the government of the particular country which imposes them. And if that observation of the judge were conversely applied to directions designed to remove harmful effects on the trade, say, of Great Britain or British nationals in America, I should myself be surprised to find that it was accepted as not being an intrusion on the rights and sovereign authority of the United States.

On the other hand, there is no doubt that it is competent for the court of a particular country, in a suit between persons who are either nationals or subjects of that country or are otherwise subject to its jurisdiction, to make orders in personam against one such party—directing it, for example, to do something or to refrain from doing something in another country affecting the other party to the action. As a general proposition, that would not be open to doubt. But the plaintiffs in this case (unlike Imperial Chemical Industries) are neither subjects nor nationals of the United States, nor were they parties to the proceedings before his Honour, nor are they otherwise subject to his jurisdiction.

What the precise relationship, commercially or otherwise, is between the plaintiffs and the defendants we have not at this stage of the proceedings considered at all, and I proceed on the assumption (and I am not to be taken as hinting that the contrary is the fact) that the plaintiffs are an independent trade corporation and entitled to be treated as independent of Imperial Chemical Industries Ld. Being so independent, they have beyond question, according to the laws of England, certain rights, certain choses in action, by virtue of the contract of 1947, which the courts of this country, in pursuance of the laws which the courts of this country claim to be entitled to administer, will in this country protect and enforce. Broadly, the right which they have may be described as their right under the contract, being an English contract made between English nationals and to be performed in England, to have it performed and, if necessary, to have an order made by the courts of this country for its specific performance. That is a right—it might be said, a species of property, seeing particularly that it is related to patents—which is English in character and is subject to the jurisdiction of the English courts; and it seems to me that the plaintiffs have at least established a prima facie case for saying that it is not competent for the courts of the United States or of any other country to interfere with those rights or to make orders, observance of which by our courts would require that our courts should not exercise the jurisdiction which they have and which it is their duty to exercise in regard to those rights.

But I think that the matter goes somewhat further. The subject-matter of the contract of December, 1946, is a number of English and Commonwealth patents. An English patent is a species of English property of the nature of a chose in action and peculiar in character. By English law it confers certain monopoly rights, exercisable in England, on its proprietor. A person who has an enforceable right to a licence under an English patent appears therefore to have at least some kind of proprietary interest which it is the duty of our courts to protect. And, certainly so far as the English patents are concerned, it seems to me, with all deference to his Honour's judgment, to be an assertion of an extraterritorial jurisdiction which we do not recognize for the American courts to make orders which would destroy or qualify those statutory rights belonging to an English national who is not subject to the jurisdiction of the American courts.

As regards the patents other than the English patents—Australian, Indian, New Zealand, South African, Irish or other—a possible distinction can, of course, be drawn, since the patents in those countries are a species of property in those countries, and an effective right to use those patents would, if necessary, have to be asserted in those countries. But no special point has been made before us as regards those Australian and other non-English patents; and, indeed, for present purposes I do not understand that it is suggested, if the injunction goes as regards the English patents, that it should not go to the full extent of the patents in the schedule. We must, in the absence of some evidence to the contrary, assume that the law in these other countries is the same as it is here; and, as I have already said, apart from what I might call the particular rights quoad the particular non-English patents, there remains the general contractual right which relates to all the patents and is derived from the English contract of December, 1946.

I think it undesirable that I should say more, except to reaffirm the proposition that the courts of this country will, in the natural course, pay great respect and attention to the superior courts of the United States of America; but I conceive that it is none the less the proper province of these courts, when their jurisdiction is invoked, not to refrain from exercising that jurisdiction if they think that it is their duty so to do for the protection of rights which are peculiarly subject to the protection of the English courts. In so saying, I do not conceive that I am offending in any way against the principles of comity which apply between the two countries; and, like Upjohn J., I take some comfort from the doubts which Judge Sylvester Ryan himself entertained about the extent to which this order might, if carried to its logical conclusion, go.

One final word: I suggested to Mr. Winn that it might be right to include in the order some express reservation of the defendants' right to apply to discharge the injunction if some change took place in the circumstances, particularly if some steps of a penal character were taken against the defendants in the American courts. But, on reflection, it seems unnecessary to make any addition to the order to that effect, for the order is (as all interlocutory orders of this kind are expressed to be) only "until judgment or further order." It will therefore, I think, suffice to say that in dismissing this appeal (as in my judgment we should) we do not in any way prejudice the right of the defendants, if any of the events that I have indicated should occur—and there is no evidence before us as to what might happen—to apply to the judge for a discharge of the injunction, either as to the whole of the subject-matter of the agreement of December, 1946, or as to some of the patents—for example, the non-English patents—or otherwise as they may be advised.

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Denning L.J. I agree. It would be a serious matter if there were a conflict between the orders of the courts of the United States and the orders of these courts. The writ of the United States does not run in this country, and, if due regard is had to the comity of nations, it will not seek to run here. But, as I read this judgment of the United States court, there is a saving clause which prevents any conflict, because although Imperial Chemical Industries has been ordered to do certain acts by the United States court, nevertheless there is a provision which says that nothing in the judgment shall operate against the company for action taken in complying with the law of any foreign government or instrumentality thereof to which the company is for the time being subject. With that saving clause, I hope that there will be no conflict between the orders.

Romer L.J. I also agree, and there is nothing that I wish to add.

Appeal dismissed.

Solicitors: *J. W. Ridsdale; Bristows, Cooke & Carpmael.*

1952
Nov. 13, 14, 19.

Wynn-Parry J.

In re BUZZACOTT. MUNDAY *v.* KING'S COLLEGE HOSPITAL.

[1951 B. 1538.]

Will—Construction—Forfeiture—Bequest to hospitals—"If any of "their funds shall have come under government control"—Effect of nationalization—Endowment funds of teaching hospitals—Meaning of "government control"—National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 6, 7, 12, 57, 59.

A testator, who died on July 23, 1949, by his will, dated September 28, 1948, directed his trustees to hold one-fourth of his residuary fund in trust to divide it equally between two hospitals and four other institutions, "Provided that if any of the funds of "the above mentioned institutions shall have come under government control at the date of my death then the share payable to "such institutions shall not be paid to them and the share or "shares which thereby lapse shall be divided equally between the "remaining institutions":—

Held, that at the date of the testator's death the funds of the two hospitals had come under government control within the meaning of that expression in the will and that, accordingly, the gifts of the shares of the testator's residuary estate to the hospitals had failed; and that those shares were divisible between the remaining four institutions.

ADJOURNED SUMMONS.

A testator, who died on July 23, 1949, by clause 8 (c) of his will, dated September 27, 1948, after disposing of three equal fourths of his residuary fund, directed as follows: "My trustees "shall hold the remaining one equal fourth part of my residuary "fund in trust to divide the same equally between the following "institutions namely Royal Eye Hospital Waterloo Road "London Benevolent Fund Incorporated Accountants The "Royal Cancer Hospital Fulham Road London S.W.3 British "Empire Cancer Campaign of 11 Grosvenor Crescent Hyde "Park Corner London S.W.1 St. Dunstan's whose headquarters "are in Regent's Park London and Toc H Provided that if "any of the funds of the above mentioned institutions shall "have come under government control at the date of my death "then the share payable to such institutions shall not be paid "to them and the share or shares which thereby lapse shall be "divided equally between the remaining institutions And I "hereby declare that the share of my residuary estate bequeathed "by me to any institution shall be for the general purposes of "such institution and such institution shall have power to apply "capital as income."

Under the National Health Service (Designation of Teaching Hospitals (No. 2)) Order, 1948 [1948, No. 979] the Royal Eye Hospital is one of a group of hospitals designated as a teaching hospital and known by the name of King's College Hospital; and the Royal Cancer Hospital (Free) is designated as a teaching hospital under the name of the Royal Cancer Hospital.

A summons was taken out by the executors to determine whether, at the date of the death of the testator, any funds of the Royal Eye Hospital or of the Royal Cancer Hospital had "come under government control" within the meaning of that expression in clause 8 (c); and whether the gifts of the shares in the residuary estate to those hospitals had failed and those shares were divisible between the remaining institutions mentioned in clause 8 (c) of the will.

A. H. Droop for the plaintiffs.

H. E. Francis for the two hospitals. These gifts are gifts to the hospitals as constituted at the date of the will. A material detail of the case is that the will was dated after the coming into force of the Act. The testator clearly had in mind the old institutions. In no sense have these funds been placed under government control. The provisions in section 9 relating to the transfer of hospital property do not include endowments. As to gifts passing under section 59, the boards are in the position of ordinary trustees and are bound to apply them for the benefit of the particular hospitals which are intended to benefit. For a definition of "government" see Murray's Oxford English Dictionary: "6. The system according to which a nation or "community is governed. 7. The governing power in a state." Any body, e.g., a local authority, might come within that definition.

E. I. Goulding for the four other institutions. The testator knew well what he was doing. He did not want any of the institutions to benefit if any of their funds came under government control. The question may be whether the hospitals are under government control at the date of the death of the testator, irrespective of how long they have been under government control. The material time is the date of the death. No importance must be attached to the date of the will. The boards of governors of the two hospitals are part of the machinery itself, to carry out what Parliament has enacted—part of the government machinery of the country. [Counsel referred to *In re Bland-Sutton's Will Trusts.*[1]]

The question here is not whether the hospitals have been nationalized, but whether any of the funds of the hospitals have come under government control. Endowments can fairly be described as subject to government control: see section 7 (2) of the Act. The trust imposes a duty on the board to do as the board thinks fit.

Passing from endowments to assets acquired under section 59, if control by the board of governors is government control, funds of this nature are government controlled.

A further class of assets, dealt with in section 6, is immovables. No distinction is drawn there between teaching hospitals and others. The question is what the testator understood by "funds." From the provisions of section 54 it will be observed that the funds, on general principles, go to reduce the burden of the taxpayer.

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[1] [1951] Ch. 485.

Have the funds of these two hospitals passed under government control? Some at any rate have passed. To come under government control means to come under the control of the Minister. There is no difference in kind between a teaching hospital and a non-teaching hospital.

N. S. S. Warren for the Attorney-General.

H. E. Francis in reply.

WYNN-PARRY J. (after reading clause 8 (c) of the will) said:— The phrase which gives rise to the difficulty is that which occurs in the opening part of the proviso: "Provided that if any of the "funds of the above mentioned institutions shall have come "under government control."

It is to be observed at the outset that the condition is not the more simple condition of "any of the above mentioned "institutions coming under government control," but is limited to the case of any of their funds so coming under control. The phrase "government control" quite clearly is in no sense a term of art, and the first question to consider is: What is the scope of that phrase? In my view, looking at the relevant part of the will to discover such context as one can, the testator here is not using that phrase in any limited sense, so that I reject the suggestion that was put forward by Mr. Francis, in argument, that any help could be obtained by consulting the definition of the word "government" in any of the dictionaries. "Government "control" as used in this will appears to me to be synonymous with State control, and what the testator, in my view, was envisaging was the nationalization of any of the institutions and that nationalization being carried out in such a way as to extend to their funds.

Both the institutions with which I am concerned, namely, the Royal Eye Hospital and the Royal Cancer Hospital, are, as can be seen from their names, hospitals. They have, as a result of the coming into force of the National Health Service Act, 1946, been absorbed so as in each case to form a part of what in the Act is called a teaching hospital. The first two defendants respectively represent the teaching hospital into which these two hospitals respectively have been absorbed. It is therefore necessary, in order to see whether, within the meaning which I have attached to the phrase "government control," the coming into force of the National Health Service Act, 1946, has brought the funds of those hospitals or either of them under government control.

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HOSPITAL.

Wynn-Parry J.

The primary object of the National Health Service Act, 1946, is to be discovered in section 1 (1), which reads: "It shall be the duty of the Minister of Health (hereafter in this Act referred to as 'the Minister') to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the peoople of England and Wales and the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with the following provisions of this Act." In section 3, which is the first section in Part II headed "Hospital and Specialist Services," with the sub-heading "Provision of Services by Minister," it is provided that: "(1) As from the appointed day, it shall be the duty of the Minister to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements, accommodation and services of the following descriptions, that is to say:—(*a*) hospital accommodation; (*b*) medical, nursing and other services required at or for the purposes of hospitals; (*c*) the services of specialists . . ."—I need not read any further.

Under the next sub-heading in Part II, "Transfer of Hospitals to the Minister," there is first section 6, which provides, to put it shortly, for the transfer to and vesting in the Minister of the buildings of the hospitals together with their equipment, furniture and other movable property. There is expressly excluded any endowment within the meaning of section 7 to which I shall come in a moment.

By section 6 (4) it is provided that "All property transferred to the Minister under this section shall vest in him free of any trust existing immediately before the appointed day, and the Minister may use any such property for the purpose of any of his functions under this Act, but shall so far as practicable secure that the objects for which any such property was used immediately before the appointed day are not prejudiced by the provisions of this section." That latter phrase is clearly a flexible phrase and is designed to leave the ultimate decision to the Minister.

I pass to section 7. Subsection (1) deals with a hospital which is designated as a teaching hospital and provides: "Where any voluntary hospital to which the last foregoing section applies" —and that applies in both the cases before me—"is, before the appointed day, designated by the Minister under this Part of this Act as a teaching hospital or is one of a group of hospitals "so designated, all endowments of the hospital held immediately "before the appointed day shall on that day, by virtue of this "Act, be transferred to and vest in the board of governors "constituted under the following provisions of this Part of this "Act for the teaching hospital." By subsection (2) it is provided that: "All such endowments shall vest in the board free "of any trust existing immediately before the appointed day "and shall be held by the board on trust for such purposes "relating to hospital services or to the functions of the board "under this part of this Act with respect to research as the "board think fit, and the board may dispose of any property "comprised in those endowments and hold the proceeds thereof "on trust for any of the said purposes." It is to be observed that first of all any existing trust affecting the endowment fund of the hospital is to cease to operate and, although the board is to hold the endowment fund which by subsection (1) is vested in it and not in the Minister, it is to hold that endowment fund on trust for hospital purposes, that is, it is to hold the fund on trusts which will, when carried out, give effect to the main purpose of the Act.

In contradistinction to the endowments of a teaching hospital the endowments of a non-teaching hospital are, by subsection (4), to be transferred to and vest in the Minister by virtue of the Act on the appointed day free from any trust existing immediately before that day, so that in the case of those endowment funds a more direct control is assumed by the Minister. As regards, however, both classes of endowment funds this direction is to be found, namely, the direction in section 7 (7): "Every board "of governors and hospital management committee shall, in the "case of any endowment transferred to them under this section, "and the Minister shall, in the case of any endowment trans-"ferred to him and the hospital endowments fund under this "section, secure, so far as is reasonably practicable, that the "objects of the endowment and the observance of any conditions "attaching thereto, including in particular conditions intended "to preserve the memory of any person or class of persons, are "not prejudiced by the provisions of this section." That is in somewhat similar language to the provision which I have already read in subsection (4) of section 6.

The result of it is, however, that as regards both types of endowment fund it is plain that any particular objects of the endowment and the observance of any conditions can only be taken into consideration, and effect can only be given to them if and so far as they are not inconsistent with the primary objects of the Act, objects which in the earlier section have been referred to as hospital purposes.

I pass now to section 11, which is under the sub-heading "Local administration of hospitals and specialist services." By subsection (1) the Minister is directed by order to constitute boards to be called regional hospital boards. By subsection (8) it is provided that "The Minister may, after consultation with "the university concerned, by order designate as a teaching "hospital any hospital or group of hospitals which appears to "him to provide for any university facilities for undergraduate "or post-graduate clinical teaching, and the Minister shall, in "the case of any hospital or group so designated, by order con-"stitute, in accordance with Part III of the Third Schedule to "this Act, a board of governors for the purpose of exercising "functions with respect to the administration of that hospital "or group; and any group of hospitals so designated shall, as "from the appointed day or the date of the designation (which-"ever last occurs), be deemed for the purposes of this Act to be "a single hospital."

Part III of Sch. III deals with the constitution of boards of governors of teaching hospitals, and provides that "The board "of governors of a teaching hospital shall consist of a chairman "appointed by the Minister and such number of other members "so appointed as the Minister thinks fit, and of those members "(*a*) not more than one-fifth shall be nominated by the university "with which the hospital is associated; (*b*) not more than one-"fifth shall be nominated by the regional hospital board for the "area in which the hospital is situated; (*c*) not more than one-"fifth shall be nominated by the medical and dental teaching "staff of the hospital; and (*d*) other persons shall be appointed "after consultation with such local health authorities and other "organisations as appear to the Minister to be concerned, "including, in the case of the original members of the board "of governors of a teaching hospital designated before the "appointed day, the governing body of any voluntary hospital "comprised or to be comprised in the teaching hospital." So far as subparagraph (*d*) is concerned it is to be observed that there is no express provision as to who is to appoint the other persons; but it is obviously intended that this power shall be vested in the Minister. So it is to be seen from a perusal of this provision that the Minister has a very considerable say in the personnel of a board of governors. That is a provision which one would expect having regard to the provision in this Act that it is the duty of the Minister to see to the constitution of this type of body as is also the case as regards such bodies as regional hospital boards and hospital management committees.

I pass to section 12, subsection (3) of which appears to be of considerable importance in the solution of this question. It reads, so far as material: "It shall be the duty of the board "of governors of every teaching hospital . . . generally to "manage and control the hospital on behalf of the Minister." On that language alone it is to my mind clear that the board of governors have to discharge their functions under the control of the Minister and on his behalf, and that that is the right view of that subsection is, I think, emphasized by the opening words of section 13. By subsection (1) of that section it is provided: "A regional hospital board and the board of governors of a "teaching hospital shall, notwithstanding that they are exercising "functions on behalf of the Minister, and a hospital management committee shall, notwithstanding that they may be "exercising functions on behalf of the regional hospital board, "be entitled to enforce any rights. . . ."

The important part of that subsection for my purpose is the emphasis that is laid on the fact that a board of governors is regarded as exercising functions on behalf of the Minister. That fits in with the language of subsection (3) of the previous section.

I pass now to section 57. Under that section there is given to the Minister in proper cases a power to declare, inter alios, a board of governors as being in default, with the result, as is provided by subsection (2) of the same section, that all "the "members of the body shall forthwith vacate their office and "the order" by which the Minister declares that body to be in default shall provide for the appointment "in accordance with "the provisions of this Act"—no doubt that refers to Part III of Sch. III—"of new members of the body."

Reliance in argument was placed on a number of other sections, but it appears to me sufficient to test this matter by reference to the case of the endowment fund of what has become a teaching hospital or one of a group constituted a teaching hospital. Those appear to me to be the relevant sections of the Act for such purpose. Their effect, I think, can be summed up in this way: the Act sets out to achieve the object of establishing a comprehensive health service in which hospitals are to play a very important part. The overriding control is given to the Minister of Health because his is made the duty of constituting

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Buzzacott, *In re.* Munday *v.* King's College Hospital.

Wynn-Parry J.

and administering that service. For the purpose of carrying out the objects of the Act the buildings, equipment, furniture and movable property of all hospitals are vested in the Minister. So far as endowment funds are concerned a distinction is made as between teaching hospitals and non-teaching hospitals. In the latter case the endowment funds are vested in the Minister; in the former case they are vested in boards of governors. They are, however, even in the case of boards of governors, freed from the trusts, which, before their transfer to such boards of governors, affected them, and the boards of governors are placed under the duty, through the use of the word "trust," to give effect to the purposes of the Act, bearing in mind any special trusts or conditions under which the endowment funds were previously held and the giving effect to which would not be inconsistent with the main purposes of the Act. But where there would be any such inconsistency the policy of the Act is to prevail over the wishes of those who established the endowment funds. The board of governors in each case is subject to the Minister. It must act under his directions and observe such regulations as he makes. It exercises its functions on his behalf. He has a very substantial voice in the appointment of the members of those boards of governors and in a proper case he can remove the whole board.

In those circumstances it appears to me to be impossible to come to the conclusion that the endowment funds taken over by a board of governors of a teaching hospital can any longer be said to be free funds, and that they are within the meaning of this phrase in the will of the testator now under government control.

There will therefore be a declaration that at the date of the testator's death the funds of the two hospitals had come under "government control" within the meaning of that expression in clause 8 (c) of the will and, accordingly, that the gifts of the shares in the testator's residuary estate to the hospitals fail and those shares are divisible between the remaining institutions mentioned in clause 8 (c).

Declaration accordingly.

Solicitors: *Carter & Barber, for Neale, Watts & Phillips, Brighton; Raymond-Barker, Nix & Co.; Farrer & Co.; Ranger, Burton & Frost; Treasury Solicitor.*

J. L. D.

GILLINGHAM CORPORATION *v.* KENT COUNTY COUNCIL.

1952
Nov. 28.

Danckwerts J.

[1952 G. No. 2865.]

Local authority — Education — Transfer of property by "former "authority"—Dispute—Arbitration—Jurisdiction of court ousted —Education Act, 1944 (7 *&* 8 *Geo.* 6, *c.* 31), *s.* 96 (2).

By section 96 (2) of the Education Act, 1944, disputes whether property has been transferred under the Act "from a former "authority to a local education authority . . . shall be determined "by the Minister." A "former authority" is defined by section 114 (1) "as any authority which was a local education authority "within the meaning of any enactment . . ." which had been repealed.

An authority which was a local education authority for certain purposes only is a "former authority" within the meaning of section 96 (2).

Where, therefore, a borough council had been a local education authority for elementary education only and had leased a building which it owned to the county council for the purposes of higher education, a dispute whether that building had been transferred to the county council under section 6 (3) of the Act was referable to the Minister and the jurisdiction of the court was ousted, and service of the writ in the action which the borough council had started for the determination of that point should be set aside.

Crisp v. *Bunbury* (1832) 8 Bing. 394 and *Crosfield & Sons Ld.* v. *Manchester Ship Canal* [1904] 2 Ch. 123 applied.

MOTION.

By this motion the defendants, the Kent County Council, asked for an order that the writ in the action brought against them by Gillingham Corporation be set aside, or that all proceedings in the action be stayed on the ground that the matter in dispute in the action was one which should be determined by the Minister of Education under section 96 (2) of the Education Act, 1944,[1] and that the jurisdiction of the court was thereby excluded.

By the action the corporation claimed a declaration that a property known as the Gillingham Technical Institute had not been transferred to the Kent County Council by virtue of section 6 (3) of the Education Act, 1944.[1] They also asked for rent due

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[1] Education Act, 1944, s. 6 (3): "All property which . . . was held "by the council of any county district "solely or mainly for the purposes of "any functions exercisable by them "under the Education Acts, 1921 to "1939 . . . shall, save as may be "otherwise directed by the Minister "under the powers conferred on him "by this Act, be transferred by virtue

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under a lease of the property dated January 6, 1937, made between the corporation and the county council.

Sir Andrew Clark Q.C. and *Wilfrid Hunt* for the Kent County Council. The whole question on the motion is whether section 96 (2) applies to the dispute. That section expressly requires that disputes relating to the transfer of property under section 6 (3) of the Act be referred to the Minister of Education. [Sections 6 (1) (3) and 96 (1) (2) (3) and (4) of the Education Act, 1944, were referred to.] The plaintiffs have refused to join with the defendants in submitting the dispute to the Minister. The defendants' claim is that the Gillingham Technical Institute was transferred to them under the Act, but that is a question for the action and is not relevant for consideration here.

The defendants contend: (1) that the question in issue in the action is whether any property was transferred under the Act—the writ establishes that that is so; (2) that the plaintiffs were a "former authority" within the meaning of section 96 (2); (3) that the dispute is whether property was transferred to a local education authority; and (4) that the Minister has made no direction that the property should not be transferred, there is no evidence of such a direction. The case clearly falls therefore within section 96 (2).

A "former authority" is defined by section 114 as an authority which was a local education authority within the meaning of any enactment which has been repealed. [He referred to section 114 of the Act of 1944, section 1 of the Education Act, 1902, and section 3 of the Education Act, 1921.] The plaintiffs' own evidence shows that they were a local education authority, they must therefore be a "former authority."

Once it is found that the case is within section 96 (2), the jurisdiction of the court is ousted: see *Crisp* v. *Bunbury*.[2] That case exactly covers the present one; it was approved by the Court of Appeal in *Crosfield & Sons Ld.* v. *Manchester Ship Canal Co.*[3]

"of this section to the local education authority for the county in which the county district is situated."

S. 96 (2): "Where any question arises as to whether any . . . property . . . [has] been transferred by virtue of this Act from a former authority to a local education authority, that question shall be determined by the Minister."

"Former authority" is defined by s. 114 (1) as "any authority which was a local education authority within the meaning of any enactment repealed by this Act or any previous Act. . . ."

[2] (1832) 8 Bing. 394.

[3] [1904] 2 Ch. 123.

Milner Holland Q.C. and *J. A. Armstrong* for the Gillingham Corporation. If section 96 (2) had the extreme width of meaning which, at first sight, it appears to have, anybody would be subject to a direction to the Minister, if they had once been a local education authority. The court will not read a section of a statute so as to exclude its jurisdiction unless it is inescapable, and that is so particularly if a question of law is concerned: see *Goldsack* v. *Shore*.[4]

It was submitted that the nature of the dispute was not relevant on the present motion, but the court must see with what the dispute is concerned. The plaintiffs were never the local education authority for higher education but they owned the Gillingham Technical Institute which they rented to the defendant county council for higher educational purposes. They prefer, however, to have decided by the courts the question whether such a building vests in the county council under section 6 (3). That is a pure question of law, which could not have been intended for the determination of the Minister.

The plaintiffs were only the local education authority for some purposes, namely elementary education, and therefore they did not hold the institute—which was leased for higher education—in connexion with their powers as such authority. They were not therefore a "former authority" within the meaning of section 96 (2) for the purpose of the dispute. If section 114 had said a former authority was a local education authority for any purposes, the position would have been different.

Armstrong followed. He referred to *In re Kellner's Will Trusts*,[5] *Crosfield & Sons* v. *Manchester Ship Canal Co.*[6] and *Minister of Health* v. *Stafford Corporation*,[7] on the question whether the Minister could consider questions of law.

Sir Andrew Clark was not called upon to reply.

DANCKWERTS J. This is a matter arising under the Education Act, 1944. The dispute in question concerns the vesting of property for the purposes of that Act. Section 6 (1) provides: "Subject to the provisions of Part I of the First Schedule to this "Act, the local education authority for each county shall be the "council of the county, and the local education authority for "each county borough shall be the council of the county

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[4] [1950] 1 K.B. 708.

[5] [1949] Ch. 509.

[6] [1904] 2 Ch. 123, 147.

[7] [1952]Ch. 730.

"borough." The plaintiffs are not a county borough and the defendants are a county council; consequently, there is no doubt that the defendants, for the purposes of the Education Act, 1944, are the local education authority. Subsection (3) provides as follows: "All property which immediately before the date of the "commencement of this Part of this Act was held by the council "of any county district solely or mainly for the purposes of any "functions exercisable by them under the Education Acts, 1921 "to 1939, and all rights and liabilities, whether vested or contingent, to which any such council were entitled or subject "immediately before the said date by reason of the exercise of "such functions shall, save as may be otherwise directed by the "Minister under the powers conferred on him by this Act, be "transferred by virtue of this section to the local education "authority for the county in which the county district is "situated."

The material date when Part II of the Act came into operation was April 1, 1945, and reference to section 1 of the Act shows that the Minister for all material purposes is the Minister of Education.

The next relevant section is section 96. Subsection (1) of that section is in the following terms: "If upon the application of a "former authority the Minister is satisfied with respect to any "property which was immediately before the date of the commencement of Part II of this Act held by that authority for "the purposes of functions exercisable by them under the "Education Acts, 1921 to 1939, that, although the property was "so held, it was held upon trust for purposes of such a nature "that the transfer thereof to a local education authority would be "inexpedient, the Minister may by order direct that the property "shall be deemed not to have been transferred by virtue of "section six of this Act to the local education authority for the "county in which the area of the former authority is situated." That is not material for the question which I have to decide, but it shows that the Minister was given a power of exclusion. Subsection (2) is the material subsection: "Where any question "arises as to whether any officers, property, rights, or liabilities, "have been transferred by virtue of this Act from a former "authority to a local education authority, that question shall be "determined by the Minister."

The present action was begun by the plaintiff borough council, who ask for a declaration that the property known as the Gillingham Technical Institute has not been transferred to the defendant council by virtue of section 6 (3) of the Education Act, 1944; and they make a claim for rent which is consequential and dependent upon the decision in respect of the declaration.

It is contended by the defendant county council that the action is started without any jurisdiction and is one which cannot be conducted because the dispute which it is sought to litigate is referred to the Minister of Education by section 96 (2) of the Act.

Reference has been made to subsection (4) of section 96. That subsection provides: "Where it appears to the Minister "that having regard to any such transfer it is desirable that any "such adjustment as aforesaid (including any payment by either "of the authorities concerned) should be made, he may, subject "to any agreement made under the last foregoing subsection, by "directions make provision for that adjustment." The Minister is thus able to make adjustments in certain cases.

The decisive words in subsection (2) of section 96 are the words "former authority," and the term "former authority" is defined in section 114 (1) of the Act as "any authority which "was a local education authority within the meaning of any "enactment repealed by this Act or any previous Act."

Reference to section 1 of the Education Act, 1902, and section 3 of the Education Act, 1921, shows that the plaintiff borough council was without doubt the local education authority for the purposes of those Acts, but only as regards elementary education and not as regards higher education. The plaintiff council is the council of a non-county borough, with a population of over 10,000 according to the census of 1901. Accordingly, it is provided by section 3 of the Education Act, 1921, that the borough council shall be the local education authority. Then it is provided in subsection (2) of section 3: "For the purposes of "higher education—(*a*) the council of a county as respects their "county; and (*b*) the council of a county borough as respects "their borough; shall be the local education authority, but the "councils of non-county boroughs and urban districts, though "not local education authorities for higher education, shall have "the powers as respects higher education given under this Act."

The position was that this institute was not used by the plaintiff council for elementary education, but that it was leased by them to the county council for the purposes of higher education. It is therefore contended that the plaintiff council was not a local education authority in respect of this property at all, and that this is not a matter to be referred to the Minister under section 96 (2) of the Act, although it is plain that the plaintiff council were a local education authority for some purposes. If the clear words of the section refer the dispute for the decision of the Minister, then there is authority that the jurisdiction of the court is ousted and is transferred to the tribunal provided for by the statute. The authority for that is *Crisp* v. *Bunbury*,[8] which was approved by the Court of Appeal in *Joseph Crosfield & Sons Ld.* v. *Manchester Ship Canal Co.*[9]

There is no doubt that the principle has often been recognized, but it is argued on behalf of the plaintiffs in this case that I ought to have regard to the mind or purpose of the persons with which this statutory provision is concerned, and that it cannot have been intended to have given to the Minister power to decide a question of the construction of section 6 (3), which must be a matter of law. But if I am satisfied on the precise terms of this subsection that that matter is referred to the Minister for decision, it seems to me that I have no choice in the matter.

It is plain that the dispute concerns property, and whether that property has been transferred or not to the defendant county council by section 6 (3) of the Education Act, 1944. It seems to me that the plaintiff council are a local education authority for the purposes of former Acts and are, therefore, a "former "authority" for the purposes of the Act of 1944, even though it may be that they were only a local education authority for certain purposes under the former Acts. It seems to me, therefore, that the words of the subsection are perfectly plain, and that this is a matter which is not open to consideration by this court, because it has been referred by section 96 (2) to the decision of the Minister and to nobody else. Accordingly, this motion succeeds, and I order that the service of the writ be set aside.

Service of writ set aside.

Solicitors: *Sharpe, Pritchard & Co., for W. L. Platts, Maidstone; Wilkinson, Howlett & Moorhouse.*

I. G. R. M.

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[8] 8 Bing. 394.

[9] [1904] 2 Ch. 123.

PALLANT *v.* MORGAN.

[1951 P. 62.]

1952
Oct. 15, 16;
Nov. 6.

Harman J.

Vendor and purchaser—Parol agreement to convey land bought at an auction, if plaintiff abstained from bidding—Failure by defendant to convey—Specific performance—Uncertainty—Fraud on plaintiff.

The agents of two neighbouring landowners agreed in an auction room immediately before an auction sale of land that the plaintiff's agent should refrain from bidding and that the defendant, if his agent was successful, would divide the land according to a formula agreed between the agents, which, however, left certain details to be agreed later. The plaintiff's agent, who had authority to bid up to £2,000, having refrained from bidding, the defendant's agent, who had authority to bid up to £3,000, succeeded in obtaining the property for £1,000, but the parties having failed to agree on those details the defendant retained the whole of the land:—

Held, that the agreement for division was too uncertain to justify an order for specific performance in the plaintiff's favour, but that the defendant was not entitled to retain the property, as that would amount to a fraud on his part, having regard to the agents' agreement in the auction room as to bidding. The true view was that the defendant's agent made his bid on behalf of himself and the plaintiff's agent and that the property was held by the defendant on trust for himself and the plaintiff jointly.

Chattock v. *Muller* (1878) 8 Ch.D. 177 considered.

WITNESS ACTION.

The defendant in this action purchased certain land at an auction on September 14, 1950, and the plaintiff (on the ground that, in the circumstances under which the defendant acquired the land, it had been agreed that the defendant should resell to him certain portions of it) claimed specific performance of the agreement; and, alternatively, a declaration that the defendant held the benefit of his contract for the purchase of the property and (if the land comprised therein had been conveyed to him) then the property in trust for himself and the plaintiff jointly; and, if necessary, an order for the sale of the property. He also claimed an injunction restraining the defendant from selling, letting, or otherwise disposing of the property without the consent of the plaintiff.

The facts are fully stated in the judgment.

Raymond Jennings Q.C. and *A. J. Belsham* for the plaintiff. Even if the plaintiff cannot obtain specific performance of the agreement, the property should be sold and the proceeds of sale be divided equally between the plaintiff and defendant, the defendant having first been repaid the £1,000. The defendant has obtained the property partly as the result of the agreement that the plaintiff should refrain from bidding. Consequently the defendant has obtained an advantage and, if he were allowed to retain lot 16, he would be benefiting from circumstances involving an element of fraud: see Fry on Specific Performance, 6th ed., p. 184, para. 386; see also *Chattock* v. *Muller.*[1]

Sir Lynn Ungoed-Thomas Q.C. and *E. Blanshard Stamp* for the defendant. The plaintiff is not, on the evidence, entitled to succeed in this action. There is a conflict of evidence. The agreement must be unequivocal, and in the present case there were several points which were not definitely settled between the parties. [Counsel referred to *Maddison* v. *Alderson.*[2]]

Nov. 6. HARMAN J. This is a dispute between neighbours as to certain land adjacent to the properties of each of them and of importance to both from an amenity point of view. The land in question was purchased by the defendant at an auction on September 14, 1950, and the plaintiff's case is that in the circumstances under which the defendant acquired the land he is bound to resell certain portions of it to the plaintiff at a price to be ascertained by way of a formula agreed between their agents for the purpose. Alternatively, the plaintiff claims that the defendant acquired the land on behalf of himself and the plaintiff with the intention of dividing it between them in such manner as they might agree and that, as they have failed to agree, the land is now held by the defendant for himself and the plaintiff jointly.

The plaintiff is the leaseholder of property known as Reeth Cottage near Fernhurst in a pleasant part of the country between Haslemere and Midhurst, forming part of a large estate known as the Blackdown Estate. The defendant is the freeholder of a farm known as Lower House Farm lying to the south of the plaintiff's property. The Blackdown Estate is to a great extent covered by woods which add to the beauty of the countryside, but of course need a considerable amount of maintenance without giving very much financial return.

The estate (or parts of it) was in the market in 1941, and it appears that there has been some felling of timber by timber merchants who acquired rights at that time. When therefore in 1950 it became known to the parties that a further auction was to be held they were naturally anxious about the woods in the vicinity of their properties. They were also conscious of the fact that if they bid one against the other no one would profit except the owner, and that it was preferable if possible that they should agree before the sale not to compete. Consequently early in August the plaintiff wrote to the defendant suggesting an agreement between them, and there followed a meeting at a friend's house at which some map or other was studied and suggestions were made as to a possible method of division. Following this, on August 10, 1950, the plaintiff sent the defendant a tracing showing by reference to the 1941 sale plan the portions which he desired to acquire.

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[1] (1878) 8 Ch.D. 177.

[2] (1883) 8 App.Cas. 467.

The defendant about this time consulted Messrs. Harrods about the not inconsiderable acquisitions which he proposed to make at the auction sale, which was by now fixed for September 14, 1950, and on August 28, Mr. James, the manager of Harrods estate office, wrote to the plaintiff demurring to his suggestions and making alternative ones. The new plan and conditions of sale were circulated at the end of August, and on September 1 Mr. James wrote again to the plaintiff suggesting that with a little give and take a common boundary could easily be fixed.

On September 3, Mr. James had an interview with the plaintiff at which there was some approach to an agreement over areas, but none as to price, Mr. James suggesting that on lot 16, as lotted on the new auction particulars, the valuable timber was on the portion proposed to be taken by the plaintiff and that an area valuation would not be fair, but that the timber should be valued and apportioned separately. This suggestion somewhat alarmed the plaintiff, who, on September 9, consulted Messrs. Cubitt & West, auctioneers and surveyors of Haslemere and elsewhere, and he was put in charge of one Mason, then an employee, but now a partner in the firm. The immediate cause of this step was a new proposal from the defendant set out in a letter of September 7, and illustrated by a plan which accompanied it.

On September 11 there was a long telephone conversation between Mr. Mason and Mr. James, searching for a formula of agreement. It is common ground that no agreement was reached at this conversation, but the two surveyors were able to define the extent of the differences between their clients and to reach certain tentative conclusions. They agreed that the basic price of the land should be between £3 and £5 an acre; also that the proper way to deal with the timber on lot 16 was to agree on a valuation of the two portions into which it would be divided and apportion it between the parties. What they did not agree was whether £3 or £5 should be the average price or how, if the two valuers disagreed, the price of the timber could be settled.

As to area, Mr. James gave Mr. Mason to understand that the defendant would not concede to the plaintiff a portion of lot 16 south of a ride running east to west and marked on a plan with the Ordnance figure "107." This position was accepted by Mr. Mason. It was agreed that the defendant would be willing to sell to the plaintiff the areas marked in green chalk "C" and "A" on the plan. "A" was in fact a small part of lot 15, which also the defendant proposed to buy. As to the area marked "B," the matter was left in doubt, the plaintiff desiring to have it and Mr. James, on his client's behalf, doubting whether it would be conceded. Thus, at this date, the parties had failed to reach an agreement, though they were near it, and this is recorded in a letter from the defendant to the plaintiff of September 12, 1950.

The auction was held on September 14, and was attended by both Mr. James and Mr. Mason, but by neither of their principals. Each had instructions to bid for lot 16, Mr. Mason up to £2,000 and Mr. James up to £3,000. Mr. James also had authority to bid for lot 15, but Mr. Mason had none. The two surveyors had not met before the sale, but they did meet for a short time immediately before it began, and there is a sharp conflict of evidence between them. The outcome of the conversation is not in doubt. Mr. Mason, who entered the auction room with instructions to bid up to £2,000 for lot 16, unless he reached an agreement with Mr. James, which he was instructed to attempt, refrained from bidding, and as a result Mr. James acquired the lot for his client for £1,000.

Two views are advanced as to the reason why Mr. Mason did not bid. Mr. Mason says that he agreed not to bid on the faith of an assurance from Mr. James that, if he refrained, the defendant, if he acquired lots 15 and 16, would convey over the portions "C" and "A" to the plaintiff at a price to be settled in accordance with the formula arrived at on September 11. Mr. James, on the other hand, says that all he did was to make what he called a friendly gesture to Mr. Mason to the effect that it would be better for Mr. Mason in his client's interest not to bid and that he (Mr. James) felt sure that in that event there would be no great difficulty in arriving at an agreement.

This difference is, in my judgment, crucial, and I am bound to choose between these two versions. I have no hesitation in choosing that of Mr. Mason. In the first place, on certain matters of detail his recollection is obviously better than that of Mr. James. Notably he said that he only had one telephone conversation with Mr. James and that on September 11, and this he was able to substantiate by contemporary entries from his office. Mr. James on the other hand says there were two conversations and that the only one of importance occurred on September 9. In this I think he was clearly wrong. Secondly Mr. James denied in the witness-box that anything he said was intended to induce or did induce Mr. Mason to refrain from bidding, but in a letter written to his employer on the day following the sale he used this expression: "I saw Bertie Pallant's agent in the sale room before "the sale commenced and he agreed to refrain from bidding." It is true that the letter goes on in these words: "on the under-"standing that you will be able to get together as to the division "of the boundaries and the timber. I have not committed you "to anything."

Now, Mr. James agreed at once that, if his letter was intended to convey that he had misled Mr. Mason into keeping out of the ring by a promise which was really no promise, that would be an act of dishonesty to which no reputable agent would stoop. Mr. James further said that he had no authority from his principal to make an agreement. This may well be so, but if he used terms in talking to Mr. Mason which reasonably induced the latter to hold his hand on the faith of an agreement that was well within the scope of his ostensible authority, and if he so induced Mr. Mason irrevocably to alter his principal's position and obtained thereby an advantage for his own principal, it does not lie in the mouth of the defendant to repudiate what was done on his behalf, and it is fair to him to say that he made no attempt to do so.

His defences were, first, that no agreement was made in the auction room, and, secondly, section 40 of the Law of Property Act, 1925, but this latter defence he abandoned at the trial as being one of which in the circumstances he did not choose to avail himself even if it was open to him and this is also to his credit.

Apart from the view I take about the value of the recollections of the two agents, there is the general consideration of the probability of the matter. I am satisfied that Mr. Mason had definite instructions to bid, unless he reached an agreement, and I do not think he would have acted in the way he did unless he at least thought he had reached such an agreement. He might of course have deceived himself, but in my judgment he did not do so. His conversation with Mr. James was, as I find, to the following effect. Mr. James observed that if agreement was to be reached the plaintiff would have to give way, not only on Ordnance No. 107, but on "B," and Mr. Mason, having express authority to that effect, agreed to do so. Mr. James then said that the defendant would not be willing to sell any part of "A" which affected certain water rights by which he set store, and Mr. Mason agreed that, in so far as the boundaries of "A" as drawn did affect them, the plaintiff would give way here also. Mr. James thereupon intimated that in that case everything would be all right, and thereupon Mr. Mason said he would not bid and did not do so.

Can, then, the plaintiff have a specific performance of the agreement so reached? In my judgment he cannot, for there is too much left undecided. There is the margin between £3 and £5 an acre, there is the exact method of valuing the timber, and there is the question of what part, if any, of "A" affects the defendant's water rights.

Is the result then that the plaintiff must fail? In my judgment not so. To allow the defendant to retain lot 16 under these circumstances would be tantamount to sanctioning a fraud on his part, and I find the following in Fry on Specific Performance, 6th ed., p. 184, para. 386, at the end of the chapter in which the author is dealing with what he styles the "uncertainty of the "contract": "The same certainty," he says, "will not be "required in cases where there is any element of fraud, as in "simple cases of specific performance of a contract. Thus where "A agreed with B in effect that if B would not try to buy a "certain estate, A would try to buy, and in case of success would "cede a portion of the estate to B at a certain price: and B "acted on his bargain and allowed A to purchase: and A having "purchased refused to perform his part and set up the uncertainty "of the part to be ceded: the court held that the defence could "not avail and directed an inquiry to ascertain the portion to be "given up and the price. It seems that if this could not have "been ascertained, B might have claimed the whole estate."

The case on which that paragraph is based is *Chattock* v. *Muller*.[3] The headnote there reads as follows: "The defendant "purchased an estate, having agreed with the plaintiff that, if he "made the purchase, he would cede part thereof to the plaintiff. "There was some uncertainty in the memorandum of agreement

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[3] 8 Ch.D. 177.

"between the plaintiff and defendant as to the exact portion "which was to be ceded to the plaintiff. In an action by the "plaintiff for specific performance of the agreement, the court "directed a reference to chambers to ascertain what portion the "plaintiff was entitled to, and decreed that the defendant should "convey such portion to the plaintiff."

In that case there was an agreement between the plaintiff and the defendant as to bidding at an auction and a subsequent division of the property if acquired. In the event, neither party acquired the property at the auction, but subsequently it was agreed between them that the defendant should attempt to buy the property by private contract, the agreement still standing, and, notwithstanding the fact that the defendant wrote to the plaintiff saying that he had had an offer and adding "you are of "course quite at liberty to offer for the property," the plaintiff having refrained from making such an offer was held entitled to have the agreement specifically performed.

Malins V.-C. gave judgment as follows[4]: "It is clear that "the defendant attended the auction partly on his own account "and partly as the plaintiff's agent, and if he had then purchased "the estate, he must have been held to be a trustee for the "plaintiff of the house and the 80 or 90 acres which it had been "arranged that he should have. The subsequent negotiations "were treated as carried on by the defendant on behalf of himself "and the plaintiff, and he treated the purchase as a joint purchase "in various letters until July 25, when he appears to have become "enamoured with the estate, and astonished the plaintiff by his "letter of that date, in which he assumed to be the owner of the "estate, part of which he had unquestionably purchased as the "agent of the plaintiff. This was a flagrant breach of duty, "which in this court has always been considered as a fraud. . . . "It was strongly argued . . . for the defendant that the plaintiff "cannot have a decree because there was no certainty as to what "part of the estate the plaintiff was to have, or as to the price "to be paid for it. In a case like this, where the defendant has "acquired the estate or part of it by a fraud on the plaintiff, I "think that the court would be bound, if possible, to overcome "all technical difficulties in order to defeat the unfair course of "dealing of the defendant, and I should not, in my opinion, be "going too far if I compelled the defendant to give the whole "estate to the plaintiff at the price given for it, rather than that

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[4] 8 Ch.D. 177, 181.

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Harman J.

"he should succeed in retaining it on account of any uncertainty "as to the part which the plaintiff is entitled to have. But I "think the memorandum in the handwriting of the defendant, "which was given to the plaintiff at the interview of June 20, "relieves the court in this case from any difficulty."

The present case is if anything stronger than that one, but I do not follow the Vice-Chancellor in his suggestion that the defendant could become bound to hand over the whole property to the plaintiff at the price he gave for it. In my judgment, the proper inference from the facts is that the defendant's agent, when he bid for lot 16, was bidding for both parties on an agreement that there should be an arrangement between the parties on the division of the lot if he were successful. The plaintiff and the defendant have failed to agree on a division, and the court cannot compel them to agree. The best it can do is to decree that the property is held by the defendant for himself and the plaintiff jointly, and if they still fail to agree on a division the property must be resold, either party being at liberty to bid, and the proceeds of sale divided equally after repaying to the defendant the £1,000 which he paid with interest at 4 per cent.

It is true that the suggested agreement would have involved the transfer to the plaintiff of a portion of lot 15, but, in default of an agreement, he cannot obtain that, for his agent had no instructions to bid for that lot in any event.

I mention, in order to show that I have not ignored it, that there was further communication between the agents after the sale in which the plaintiff's agent was still asking for the transfer to the plaintiff of "B," and that on September 23, Mr. Mason wrote to Mr. James agreeing not to ask further for "B" and also to concede such part of "A" as contained the source of the defendant's water. He ended this letter with the expression: "This, I hope, settles the boundaries." It was urged on me that this showed that the plaintiff's agent knew that there had been no agreement before the sale. I think it does show that he realized that the details of the agreement had been left in doubt, but this, in my judgment, is not fatal to the plaintiff's case, which rests on the fact that his agent was kept out of the ring at the auction by a promise that, if he did not bid, an agreement would be reached.

Solicitors: *Gascoin & Co.; William Charles Crocker.*

J. L. D.

In re 56 DENTON ROAD, TWICKENHAM.

1952
Oct. 9, 10,
13, 14, 21.

Vaisey J.

[1951 V. No. 40.]

War Damage—War Damage Commission—Notification stating that preliminary classification had been reviewed—Determination—Whether public body entitled to withdraw a decision or determination—Estoppel—War Damage Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *ss.* 7, 13, 14, 20, 32.

Where Parliament confers upon a body such as the War Damage Commission the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot in the absence of express statutory power or the consent of the person or persons affected be altered or withdrawn by that body.

In November, 1940, the plaintiff's house was partly demolished by enemy action. By a letter dated November 12, 1945, the War Damage Commission by their regional manager informed her that the preliminary classification of the property for the purposes of compensation as a total loss had been reviewed and asked her if she agreed to the reclassification of the property. The letter went on to explain that when a property was classified "not a total loss" the commission would make a cost of works payment. Subsequently the plaintiff agreed to the reclassification. Under a cost of works payment the plaintiff would receive a considerably larger sum by way of compensation than if a value payment was made in respect of total loss.

On July 15, 1946, the plaintiff received a letter from the commission informing her that it had been decided to revert to the total loss classification, and on February 10, 1947, a printed form was sent to the plaintiff headed "Notice of determination under "the War Damage Act, 1943, of the kind of payment to be made "in respect of war damage." The form stated that the commission had determined that the damage suffered by the plaintiff's property involved total loss as defined by section 7 of the War Damage Act, 1943, and that a value payment would be made.

On the question whether the letter of November 12, 1945, constituted a determination of the plaintiff's rights under the Act:—

Held, that by the letter of November 12, 1945, the commission had determined finally and irrevocably that the damage which the plaintiff's property had suffered was one for which a cost of works payment ought to be made, and that such determination was a determination within the meaning of the Act and was binding on the commission.

Attorney-General v. *Hughes* (1899) 81 L.T. 679 applied.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

1952

56 DENTON ROAD, TWICKENHAM, *In re.*

ADJOURNED SUMMONS.

The plaintiff was the owner of a developed hereditament, No. 56 Denton Road, Twickenham. On November 19, 1940, the property was partly demolished by enemy action, and in December, 1940, the local authority pulled down what remained standing of the house. Section 7 of the War Damage Act, 1943, provided that in the case of a developed hereditament the payment was to be a cost of works payment, unless the damage involved total loss, which gave rise to a value payment. Under a cost of works payment the amount payable to the plaintiff would be about £5,000, whereas the value payment had been fixed at £1,616 15s. Under the terms of a direction given by the Treasury under section 20 of the Act the commission had power to make a cost of works payment in certain cases notwithstanding that the war damage involved total loss.

By two notifications dated November 30, 1943, and September 1, 1944, the commission informed the plaintiff that a preliminary classification of total loss had been made in respect of her house. On January 25, 1945, the commission wrote to the architect acting for the plaintiff and requested certain further information on the grounds that it would help them in reviewing her case. This he gave them, and after certain further correspondence, the regional manager of the commission sent to the plaintiff's architect the letter dated November 12, 1945, which gave rise to the present proceedings: "*Re* 56 "Denton Road, E. Twickenham. I have to advise you that "the preliminary classification of 'total loss' in respect of this "property has been reviewed, and it has been decided to cancel "the notifications sent to you on 30/11/43 and 1/9/44. Will "you be good enough, therefore, to inform me whether you "agree to the reclassification, and if you do please return to "me forms Val. 2 and Val. 5. I would explain that when a "property is classified 'not a total loss' the commission will "make a cost of works payment." The plaintiff agreed to the proposals in this letter and returned the forms as asked.

On July 15, 1946, the plaintiff received a letter from the commission informing her that it had been decided to revert to the total loss classification, and on February 10, 1947, a printed form was sent to the plaintiff headed, "Notice of "determination under the War Damage Act, 1943, of the kind "of payment to be made in respect of war damage." The form stated that the commission had determined that the damage suffered by the plaintiff's property involved total loss as defined under section 7 of the War Damage Act, 1943, and that a value payment would be made.

By this summons as amended the plaintiff asked for a declaration that on the true construction of the Act and of the letter of November 12, 1945, the commission had determined or must be deemed to have determined, finally and irrevocably, that the damage which the plaintiff's property had suffered was one for which a cost of works payment ought to be awarded, on the ground that such damage did not involve or must in the circumstances be deemed not to have involved total loss, or that the case fell, or must be deemed to fall, within the direction of the Treasury given under section 20 of the Act.

Diplock Q.C. and *W. G. H. Cook* for the plaintiff. It is submitted that the letter of November 12, 1945 constituted a determination by the defendants of the kind of payment to be awarded to the plaintiff in respect of the war damage suffered by the property in question. There is nothing in its terms to suggest that it was merely another preliminary classification. This determination having been made was final and binding on the defendants. Sections 13, 14 and 20 of the Act of 1943 make it plain that in every case where there is a claim for compensation in respect of war damage it is necessary to determine whether the damage in question did or did not involve total loss. That determination created valuable rights which can only be altered in the circumstances expressly laid down in the Act and which provide for the protection of persons who have acted on the faith of the original determination. Rights so created are capable of assignment and thus affect both parties. It is not necessary that the word determination should appear in the communication sent to the claimant provided that that is the effect of its terms: see *Attorney-General* v. *Hughes*.[1] There was nothing in the letter in question to prevent the plaintiff or her architect from holding the view that it constituted the final decision of the defendants concerning the plaintiff's claim under the Act.

Further, it is submitted that the plaintiff's rights come within a principle to be derived from the authorities and which might be formulated as follows: where Parliament confers upon a body such as the War Damage Commission the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot in the absence of express statutory power or the consent of the person or persons affected be altered or withdrawn by that body: *Livingstone* v. *Westminster Corporation* [2]; *Robertson* v. *Minister of Pensions.*[3]

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[1] (1899) 81 L.T. 679.

[They also referred to section 32 of the Act.]

Denys Buckley for the War Damage Commission. The plaintiff's case is that the War Damage Act, 1943, imposes on the commission the duty of making a determination, from which certain rights to compensation flow.

The questions arose: (1) what type of payment should be made; (2) who are the persons to receive it? The commission are bound to change their decision if they become aware of new facts and it must be open to them to review their decisions as often as circumstances make it necessary.

It has been decided by the notice of February 10, 1947, that this is a case of total loss. If it had been within the Treasury Direction a cost of works payment could have been made. But for a cost of works payment to be made certain circumstances must exist and unless they do exist the commission has no power to make a cost of works payment. The commission was informed by their officer that the house did not come within the terms of the Treasury Direction for a cost of works payment, and accordingly they were not entitled to make such a payment.

The Act itself contemplates a power to review an award of compensation. The rights of the plaintiff here depend on the physical facts of the damage which the property suffered. If those facts were that the damage involved a total loss, there is no power to award a cost of works payment unless the case falls within the Treasury Direction.

[Sections 32–37 of the Act were also mentioned.]

Diplock Q.C. in reply.

Cur. adv. vult.

October 24. The following judgment was read:—

Vaisey J. [referred to the earlier correspondence which passed between the plaintiff and the defendants and continued:] Now, what did the letter of November 12, 1945, mean? It is quite obvious what Mr. Jay Evans [the plaintiff's architect] thought it meant when he said that it stated that the property had been classified as a " cost of works " claim. The defendants took no steps to contradict him and, indeed, I think that they would admit that it was such a classification, the real issue in this case being whether it was merely another conditional and preliminary classification, liable to be withdrawn or varied at the will of the defendants, or whether the commission having come to a conclusion, and having notified it to the plaintiff by the said letter, they cannot now resile from it.

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[2] [1904] 2 K.B. 109.

[3] [1949] 1 K.B. 227.

The defendants' counsel asked me to hold that the letter was no more than an invitation to a reopening of negotiations, but its terms do not to my mind suggest anything of the kind. However, on July 15, 1946, the defendants wrote again to the plaintiff, or her architect, telling her, without any explanation, excuse or expression of regret, that "It has been decided to "revert to the 'T' classification" (meaning the "total loss" classification), which, on July 20, 1946, produced the following letter to the regional manager from the plaintiff's architect: "*Re* 56 Denton Road. I have received a letter from you dated "July 15, respecting the above premises. I received a notifica-"tion from you on November 12, 1945, stating that the property "was not classified as a 'total loss.' I agreed with this, and as "requested, returned forms Val. 2 and Val. 5. I have made no "further application in this case and I am at a loss to understand "the purport of this communication."

Mr. Jay Evans professes himself as being at a loss, and I am not surprised at his feelings of perplexity. However, after some further correspondence, to which I need not refer in detail, there was a letter from the architect, Mr. Jay Evans, to the defendants, dated October 2, 1946, in the course of which the writer says: "My contention is that the war damage did not involve "total loss. The war damage was turned into a total loss by the "local authority without referring to my client at all. In fact, "she was in hospital at the time. Subject to legal advice, it "seems clear to me that the classification as a total loss is a "wrongful one," etc.

Further letters passed between the parties and ultimately, on February 10, 1947, another printed form, headed by the Royal Arms, was issued by the defendants in the following terms: "War Damage Commission. Notice of Determination under The "War Damage Act, 1943, of the kind of payment to be made in "respect of War Damage. Property: 56, Denton Road, "Twickenham. The War Damage Commission have this 10th "February, 1947, determined that the war damage to the "property described above involves total loss as defined under "section 7 of the War Damage Act, 1943, and that the kind of "payment to be made in respect of the war damage is a value "payment."

In my judgment, this last-mentioned document [the notice of February 10, 1947] does not differ in character from the letter of November 12, 1945, or from the letter of July 14, 1946. It is not suggested that it derives any force or validity, either from the Royal Arms at the head of it or from its use of the words "determination" and "determined," which are, of course, the words used in section 32 (1) and (2) of the Act. Indeed, the defendants, by their counsel, claim that it is just as inconclusive and just as lacking in finality as the letter of November 12, 1945 is, according to them. And they say that they have a perfect right to change their minds as their policy changes or as fresh evidence comes to light or further advice is given to them by their technical advisers, and that unless a determination of theirs has been acted upon in some way so as to raise a case of estoppel, they can go on altering it, as, and as often as, occasion arises. Why, if that is the position, was their first classification described as preliminary, while the intimation given by the letter of November 12, 1945, was not so described? The points seem to be, first, whether the letter of November 12, 1945, is a determination within the meaning of that word as used in the Act and, secondly, whether that letter is so devoid of finality that no reliance ought to be placed upon it.

Now, first of all, there is no magic in the word "determination." That, I think, is obvious. For if any two words in such a context as this are synonymous, that is, in my judgment, true of the words "decide" and "determine." And it is interesting to note that in *Attorney-General* v. *Hughes* [4] a letter from the Charity Commissioners, expressing their opinion on a question submitted to them, was held to be a determination by them under the powers conferred on them by section 70 (2) of the Local Government Act, 1894.

On the second point the plaintiff's counsel offered for my acceptance the following proposition: that where Parliament confers upon a body such as the War Damage Commission the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms

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[4] 81 L.T. 679.

1952

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which are not expressly preliminary or provisional is final and conclusive, and cannot in the absence of express statutory power or the consent of the person or persons affected be altered or withdrawn by that body. I accept that proposition as well-founded, and applicable to the present case. It is, I think, supported by *Livingstone* v. *Westminster Corporation*[5] and *Robertson* v. *Minister of Pensions*.[6]

I think that the letter of November 12, 1945, was one upon which the plaintiff was invited to rely and was and is entitled to rely. It is, I think, admitted that if she had altered her position in reliance upon it, a case of estoppel would have been raised against the defendants. But I really cannot see that it ought to be denied its proper force and effect, quite apart from such a case.

I think that the contrary view would introduce a lamentable measure of uncertainty, and so much disturbance in the minds of those unfortunate persons who have suffered war damage that the Act cannot have contemplated the possibility of such vacillations as are claimed to be permissible in such a case as the present.

How does the evidence of the defendants affect the position? If it were discovered within a reasonable time that a " determination " had been reported by some order on the part of an official of the defendants which had never in fact been made, or that there had been some mistake or misconception upon which I could find that the document did not accord with the facts which it purports to record, the position might have been different. But that is not what the defendants say. In the affidavit filed on their behalf they first refer to the Treasury direction given under section 20 (1) of the Act. Next they say that having received from Mr. Jay Evans the drawings of the plaintiff's house they wrote the letter of November 12, 1945, " in the light " of " a report by an officer of theirs that in his view the plaintiff's house did satisfy the conditions laid down in the Treasury direction.

The next thing that apparently happened was that the owner of the adjoining house, No. 58 Denton Road, heard of the defendants' decision and claimed to be entitled to be treated in a similar manner. That seems to have shown to the defendants that they had created an awkward precedent, and to meet that predicament they called in someone whom they describe as " a " superior officer " to reconsider the matter. He (the superior officer) appears to have differed from the opinion of the first officer and to have advised the defendants that the conditions of the Treasury direction had not been fulfilled, with the result that they recanted and reversed their previous decision, and wrote the letter of July 15, 1946. I am entitled, I think, to suggest the possibility that a yet more superior officer (if his advice had been sought) might well have adopted the view of the first and not-so-superior officer, just as the House of Lords has occasionally reversed a decision of the Court of Appeal and restored that of the judge of first instance.

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[5] [1904] 2 K.B. 109.

[6] [1949] 1 K.B. 227.

Where, it may be asked, is this process to stop? Is the matter to be referred to a sequence of officers, each one superior to the one immediately before him? If an officer (superior or not) gives advice to the defendants which, having been reported to the person affected, turns out to be embarrassing, can the defendants, without any notice to such person, go on from officer to officer until they obtain advice which is more to their liking? I cannot think that this is what the War Damage Commission ought to do. I think they should at least refrain from buoying up the hopes and expectations of those with whom they deal by reporting "determinations" in terms which make them appear to be, although they are not in fact, final, fixed and conclusive.

This judgment can do no harm to the defendants. Let them mark every intimation of a "determination" of theirs as "provisional," "subject to alteration," "not to be relied upon" or words to that effect.

On the question of procedure, it is obvious that upon this summons, which is issued under R.S.C., Ord. 54A, rr. 1 and 1A, the actual relief which is asked could not possibly be given, but I have allowed the summons to be amended by asking in the alternative for the relief which I propose to give, namely, to declare that upon the true construction of the War Damage Act, 1943, and of the said letter of November 12, 1945, the defendants have determined, or must be deemed to have determined, finally and irrevocably that the damage which the plaintiff's property has suffered is one for which a cost of works payment ought to be awarded on the ground that such damage either did not involve, or must in the circumstances be deemed not to have involved, total loss, or that the case falls, or must be deemed to fall, within the direction of the Treasury given under section 20 of the Act.

The defendants must pay the plaintiff's costs of the action.

Declaration accordingly.

Solicitors: *Worrell, Fordyce & Lys; Treasury Solicitor.*

In re STONEHAM SETTLEMENT TRUSTS.
POPKISS AND ANOTHER *v.* STONEHAM AND ANOTHER.

1952
Oct. 2.

Danckwerts J.

[1952, S. 584.]

Trustee—Trustee "out of the United Kingdom for more than twelve "months" but unwilling to retire from trusts—Appointment by continuing trustee of trustee in his place—Retirement of continuing trustee by same instrument — Trustee abroad for more than 12 *months removable against his will—Not a "retiring trustee"—Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *s.* 36 (1), (8).

A trustee who remains out of the United Kingdom for more than 12 months can be removed under the statutory power contained in section 36 (1) of the Trustee Act, 1925, whether he agrees or not: and the apparent statements to the contrary in Lewin on Trusts, 15th ed., at p. 422 and Underhill on Trusts and Trustees, 10th ed., at pp. 449 and 450 are unfounded.

A trustee removed against his will is not "a refusing or retiring "trustee" within section 36 (8)—not, at any rate, if he "remains "out of the United Kingdom for more than 12 months." Thus, he is not a person whose concurrence is required in the appointment of any new trustee.

Stones v. *Rowton* (1853) 17 Beav. 308; *Travis* v. *Illingworth* (1865) 2 Dr. & Sm. 344 and *In re Coates to Parsons* (1886) 34 Ch.D. 370 considered.

ADJOURNED SUMMONS.

At the date of the two appointments hereinafter mentioned the trustees of a settlement dated February 15, 1924, were Stoneham (a son of the settlor) and Crosthwaite. At the same date the trustees of the will, dated March 4, 1927, of the settlor, who died on April 12, 1927, were the settlor's widow and Stoneham and Crosthwaite.

Both appointments were dated December 11, 1950, at which date the widow and Stoneham had remained out of the United Kingdom for more than 12 months. By one appointment which related to the settlement Crosthwaite alone appointed Popkiss and Lewin trustees in the place of Stoneham and of himself, Crosthwaite by the same deed retiring from the trusts; and by the other, which related to the will, Crosthwaite alone appointed Popkiss and Lewin to be trustees in the place of the widow, Stoneham and himself, Crosthwaite by that deed retiring from those trusts also. On December 18, 1950, the widow died.

The value of the property involved was considerable, and Stoneham contested the validity of both appointments. He did not dispute that he had been out of the United Kingdom for more than 12 months and did not allege that Crosthwaite had acted otherwise than in good faith. He contested the validity on the ground that he was entitled to be called on to concur in any appointments made and that, accordingly, those made by Crosthwaite alone were invalid. It was clear from correspondence that Stoneham was not entirely ready to retire from the trusts if he could avoid doing so, and that there was disagreement on the question who should be appointed new trustees.

By this summons, which was taken out on February 4, 1952, by Popkiss and Lewin (hereinafter called " the plaintiffs "), and to which Stoneham and Crosthwaite were defendants, the plaintiffs asked inter alia for a declaration that on the true construction of section 36 of the Trustee Act, 1925,[1] and of the appointment relating to the settlement, and in the events which had happened, the plaintiffs were validly appointed new trustees of the settlement in place of the defendants and were the present trustees of the settlement; and a declaration that on the true construction of the section and of the appointment relating to the will, and in the events which had happened, they were validly appointed new trustees of the will and of a codicil thereto in place of the defendants and of the widow since deceased and were the present trustees of the will and codicil.

Maurice Berkeley for the plaintiffs. Both appointments are valid. True, before the passing of the Conveyancing Act, 1881, it had been held that a power given to surviving or continuing trustees to appoint new trustees could not be exercised by retiring trustees: *Stones* v. *Rowton*[2]; see also *Travis* v. *Illingworth*,[3] approved in *In re Coates to Parsons*.[4] Refusing trustees and retiring trustees were enabled to exercise the power by section 31 (6) of the Conveyancing Act, 1881, section 10 (4) of the Trustee Act, 1893, and section 36 (8) of the Trustee Act, 1925. A much earlier Act, Lord Cranworth's Act, 1860 (23 & 24 Vict. c. 145), entitled "An Act to give to trustees, mortgagees and others "certain powers now commonly inserted in settlements, mort-"gages, and wills," contained, in section 27, a like power for a surviving or continuing trustee, but not for a refusing or retiring trustee, to appoint new trustees.

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[1] Trustee Act, 1925, s. 36 (1): " Where a trustee . . . is dead, or " remains out of the United Kingdom for more than twelve months, " or desires to be discharged from " . . . the trusts . . . reposed in . . . " him, or refuses or is unfit to act " therein, or is incapable of acting " therein, or is an infant, then, subject to the restrictions imposed by " this Act on the number of trustees, " —(*a*) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; " or (*b*) if there is no such person, " or no such person able and willing " to act; then the surviving or continuing trustees or trustee for the " time being, or the personal representatives of the last surviving or " continuing trustee; may, by " writing, appoint one or more other " persons (whether or not being the " persons exercising the power) to be " a trustee or trustees in the place " of the trustee so deceased remaining out of the United Kingdom, " desiring to be discharged, refusing, " or being unfit or being incapable " or being an infant, as aforesaid." Subsection (8): " The provisions of " this section relating to a . . . continuing trustee include a refusing " or retiring trustee, if willing to act " in the execution of the provisions " of this section."

J. P. Hunter-Brown for Stoneham, the trustee abroad. The trustee abroad did not and does not wish to retire from the trusts and cannot be compelled so to do: see Lewin on Trusts, 15th ed., p. 442, and Underhill on Trusts and Trustees, 10th ed., pp. 449, 450. In *In re Coates to Parsons*[5] which, it is true, approved *Travis* v. *Illingworth*,[6] the court would not allow an objection to an appointment in the place of a trustee who had been abroad for more than 12 months because there was no evidence that the absent trustee was willing or competent to join in appointing. Here there is abundant evidence of the strongest wish to do so: and the trustee abroad is competent to do so. In the circumstances he is a "retiring trustee . . . willing to act in the execution "of the provisions" of the section within section 36 (8) of the Trustee Act, 1925, and, as such, has the right to join in making new appointments. The purported appointments of the plaintiffs by Crosthwaite are therefore invalid.

W. A. Bagnall for Crosthwaite, the appointing trustee. The appointing trustee is, within section 36 (8), a "retiring trustee ". . . willing to act in the execution of the provisions of" the section and could therefore make the appointments which he did make. The trustee abroad, however, cannot by any stretch of imagination come within that provision. On his own showing, so far from being a refusing trustee, he wished and, apparently, still wishes, to continue in the trusts: and, notwithstanding certain dictionary definitions, it is not open to him to contend that "retiring" includes compulsorily retiring. "Retiring" in subsection (8) is not used in any sense connoting compulsion. The appointment in the place of the trustee abroad was and could be made solely on the ground of his being "out of the United

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[2] (1853) 17 Beav. 308.

[3] (1865) 2 Dr. & Sm. 344.

[4] (1886) 34 Ch.D. 370.

[5] 34 Ch.D. 370.

[6] 2 Dr. & Sm. 344.

"Kingdom for more than 12 months" and the suggestions to the contrary in Lewin on Trusts, 15th ed., p. 422, and Underhill on Trusts and Trustees, 10th ed., pp. 449, 450, must be without foundation.

DANCKWERTS J. [having stated the facts]:—The point depends entirely on the effect of the statutory power which is to be found in section 36 of the Trustee Act, 1925. The provisions of that section which are relevant are for practical purposes identical with the provisions which were contained in section 10 of the Trustee Act, 1893, and section 31 of the Conveyancing and Law of Property Act, 1881. It is plain that the Conveyancing Act, 1881, for the first time, introduced the relevant word which I have to consider, the position previously having depended on Lord Cranworth's Act or somewhat similar provisions which were to be found in express powers to appoint new trustees contained in settlements and wills.

[His Lordship then read section 36 (1) and continued:] When the Conveyancing Act, 1881, was passed there had been already judicial decisions on express powers contained in wills and settlements, namely *Stones* v. *Rowton*,[7] decided in 1853, and *Travis* v. *Illingworth*,[8] decided in 1865, to the effect that persons who were not going to continue after the appointment to be made were not surviving or continuing trustees for the purpose of an express power in similar terms to the provisions, in effect, of section 31 of the Conveyancing Act, 1881, and of the section which I am construing. Probably for that reason, a special provision was introduced, in section 31 (6) of the Conveyancing Act, 1881, section 10 (4) of the Trustee Act, 1893, and section 36 (8) of the present Act of 1925 which, in my view, introduced a change.

[His Lordship read section 36 (8) of the Trustee Act, 1925, and continued:] It is plain to my mind that the references to a refusing or retiring trustee were directed to the decisions to which I have referred and were to enable a difficulty to be surmounted when there might otherwise be no one person in existence if there was no person to continue after the appointment who could execute the statutory power.

It is plain, I think, that on the provisions of subsection (1), as was the case on the provisions of the corresponding subsections in the Conveyancing Act, 1881 (section 31 (1)), and the Trustee Act, 1893 (section 10 (1)), both the defendants—that is to say, both Stoneham and Crosthwaite—would have failed to be within

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[7] 17 Beav. 308.

[8] 2 Dr. & Sm. 344.

1952

STONEHAM SETTLEMENT TRUSTS,
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Danckwerts J.

the description of the persons who could execute the statutory power; but it is plain that Crosthwaite, at any rate, is a person, a retiring trustee, who is within the wider construction which is to be applied to the words " continuing trustee " by section 36 (8) of the Trustee Act, 1925.

The real point is: Do those wider provisions also include Stoneham? Stoneham, as it seems to me, is a person who can be removed under the statutory power whether he agrees or not. It seems to me that the words of section 36 (1) are plain in that respect, and I do not understand the doubts, which appear to have been raised in Lewin on Trusts, 15th ed., at p. 422, and Underhill on Trusts and Trustees, 10th ed., at pp. 449 and 450, suggesting that a person who has remained outside the United Kingdom for more than 12 months cannot be removed against his will. It seems to me that the provision is quite clear and that he can be removed against his will: but, of course, that is not the end of the matter, because it may still be possible that he is entitled to demand that he shall join in the appointment of the new trustee or trustees.

Is he a person who is a refusing or retiring trustee? He has been removed because he has been out of the United Kingdom, for the reason no doubt that it is inconvenient to have a trustee who does not reside in the country where the trusts have to be performed normally, but it does not follow that he is refusing to act, and, indeed, it seems clear on the facts that Stoneham was prepared to act. Is he, however, a trustee who is retiring? Stoneham, I think, was not entirely prepared to retire, not, at any rate, in all the circumstances. It is really a case where the trustee who is removed is taken from the trusts compulsorily and does not retire of his own volition. It seems to me, in the absence of any authority which binds me to decide otherwise, that a person who is compulsorily removed from a trust is not a person who retires and is not a retiring trustee.

As I said, the matter does not seem to have had to be decided by any judge directly, but in *In re Coates to Parsons*,[9] decided in 1886, North J. had to consider section 31 of the Conveyancing Act, 1881, in the case of a person who was alleged to have been removed from the trusts under the provisions of that section by reason of his having been outside the United Kingdom for more than 12 months. He says: " If I were dealing with an instru-" ment containing a power to appoint new trustees expressed in " the words of subsection (1) of section 31, and not containing

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[9] 34 Ch.D. 370, 377.

"anything further, I should, for the reasons which I have stated, "come to the conclusion that the persons who were continuing "to act as trustees had the power of appointing new trustees, "without the concurrence of a person who was ceasing to be a "trustee by virtue of the appointment." That, of course, would cover the case not only of a trustee who is out of the country, but also of the person who wished to be discharged and retire on the new appointment.

Then he proceeds to consider subsection (6) and to consider whether subsection (6) (which, as I said, was more or less in identical terms with subsection (8) of the present Act) covered the case of a trustee who had remained outside the United Kingdom for more than 12 months; and he really avoids the difficulty which might confront the court of having to decide whether such a person is within the section or not, because he finds in the particular case that there was no evidence that the person concerned was ready and willing to act. He said: "I hold, "therefore, that under the terms of the Act the nine trustees, "who were clearly continuing trustees, were competent to make "the appointment, unless it were shown that the person who had "been absent for so long, and in whose place there was a clear "right to substitute a new trustee, was willing and competent to "act. This has not been shown, and it seems to me, therefore, "that the first objection, namely, that W. R. Dearlove ought to "have concurred in making the appointment, is not established."

Of course, it is a fair observation that unless it was possible for the trustee who had been out of the United Kingdom to have concurred in the terms of subsection (6), it was not necessary to consider that subsection, but North J. was able to decide the matter on the basis of the facts. He was able to come to the conclusion, really, that even if the subsection did apply, the person who was absent overseas could not satisfy on the evidence the terms of the subsection and, therefore, could not be a person who was entitled to have concurred in making the appointment.

It seems to me, therefore, that this decision does not fetter the view which I should otherwise be disposed to take of the proper construction of the section, and I come to the conclusion quite plainly that a trustee who is removed against his will is not a refusing or retiring trustee, not, at any rate, in the case of a trustee removed because of his absence outside the United Kingdom for consecutive periods of more than 12 months.

It seems to me, therefore, in the present case, that Stoneham was not a person whose concurrence was required to the

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appointments which were made by Crosthwaite, that Crosthwaite was the only person who answered the description contained in section 36 (1), as modified or extended by the provisions of subsection (8), and, therefore, the appointments which were made by Crosthwaite were valid and effective.

Declarations accordingly.

Solicitors: *Neish, Howell & Haldane; Kenneth Brown, Baker, Baker.*

K. R. A. H.

WHITE *v.* BRISTOL AEROPLANE CO. LD.

[1952 W. 4263.]

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Evershed M.R., Denning and Romer L.JJ.

Company — Proposed increase of capital — Notice summoning general meeting of ordinary shareholders to authorize this — Action by preference stockholder for injunction—On ground that sanction of preference stockholders by extraordinary resolution required—Injunction refused—Articles of Association, arts. 62, 68.

The defendant company was proposing to increase its capital by the issue of 660,000 £1 preference stock, ranking pari passu with the existing 600,000 £1 preference stock, and 2,640,000 ordinary shares of 10s. each intended to rank pari passu with the existing ordinary stock, all the new shares to be issued to the existing ordinary stockholders and paid for out of the reserve fund of the company.

The plaintiff was a preference stockholder and brought proceedings on behalf of himself and all the other preference stockholders and moved for an interim injunction to restrain the company from (a) convening a general meeting for this purpose without summoning the preference stockholders to attend the meeting; and (b) passing or acting upon the proposed resolution without the sanction of an extraordinary resolution passed at a separate meeting of the holders of the preference stock in accordance with article 68 of the company's articles of association.

Article 62 of the company's articles of association conferred on the company in general meeting power to issue the proposed new shares. Article 68 provided so far as material: "All or any of "the rights or privileges attached to any class of shares forming "part of the capital for the time being of the company may be "affected, modified, varied, dealt with, or abrogated in any manner

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"with the sanction of an extraordinary resolution passed at a "separate meeting of the members of that class. . . ." Under article 83 the holders of preference stock were not to receive notice of a general meeting or to attend and vote there unless the meeting was convened (inter alia) "to consider a resolution directly affecting "their rights or privileges as a separate class":—

Held, that the proposed issue of new capital did not "affect" the rights or privileges of the existing preference stockholders. They might be affected as a matter of business by reason of the new preference stock which would be in the possession of the ordinary shareholders and have a majority over the existing preference stock. This, however, would affect only the enjoyment of the rights, and not the rights themselves.

In re Mackenzie & Co. Ld. [1916] 2 Ch. 450 and *Greenhalgh* v. *Arderne Cinemas Ld.* [1946] 1 All E.R. 512 considered.

Decision of Danckwerts J. reversed.

Appeal from Danckwerts J.

The defendant company had an issued share capital of £3,900,000 consisting of £600,000 five per cent. cumulative preference stock of £1 each, and £3,300,000 ordinary stock, and it was proposing to increase its share capital by £660,000 preference shares of £1 each, ranking pari passu with the existing preference stock, and 2,640,000 shares of 10s. each, ranking pari passu with the existing ordinary stock. The new preference and ordinary shares were to be issued to the existing ordinary shareholders and paid for out of the reserve fund of the company.

The company therefore proposed to summon a general meeting of the ordinary shareholders for the purpose of obtaining their authority for what was proposed. Draft notices had been sent out. In these circumstances the plaintiff for and on behalf of himself and all the other preference stockholders brought proceedings for an injunction to restrain the company from "(a) convening a "general meeting to consider the resolutions set out in the draft "notice . . . without giving notice of such general meeting to the "holders of the preference stock of the company, and (b) passing "or acting upon such resolutions without the sanction of an "extraordinary resolution passed at a separate meeting of the "holders of such preference stock in accordance with article 68 "of the defendant company's articles of association." And the plaintiff moved for an interim injunction.

The material articles of association of the company are all stated in the judgment of Evershed M.R.

Danckwerts J. granted the injunction asked for, applying his previous decision in *In re John Smith's Tadcaster Brewery Co.*

Ld.,[1] and holding that the proposed increase in the capital of the company would affect the voting rights of the holders of the existing preference stock.

The company appealed.

J. G. Strangman Q.C. and *K. L. Coghlan* for the company. There is no ground for saying that the rights of the existing preference stockholders are affected by the proposed issue of new preference shares and ordinary shares, and if their rights would be left undisturbed Danckwerts J. ought not to have granted the injunctions asked for by the plaintiff. In acting as he did Danckwerts J. relied on his earlier decision in *In re John Smith's Tadcaster Brewery Co. Ld.*,[1] a case which is under appeal. The question turns on the memorandum and articles of association of the company, and clause 6 of the memorandum confers power on the company to issue new capital. The relevant articles of association are article 62, which empowers the company in general meeting to issue new capital and as to preference stock or shares to rank pari passu with the existing preference stock but so that the preference stock shall not exceed the ordinary shares; article 63 enables the company in general meeting to offer new shares to the existing shareholders. Then article 68 provides that " all or any of the rights or privileges attached to any class of " shares . . . may be affected, modified, varied, dealt with, or " abrogated in any manner with the sanction of an extraordinary " resolution passed at a separate meeting of the members of that " class." It is on that that the plaintiff relies, on the ground that the preference stockholders' rights are " affected " by what is proposed, and the claim to be summoned to vote at the general meeting of the company is based on article 83, on the ground that the meeting is to be convened " to consider a resolution " directly affecting their rights or privileges as a separate class."

When the matter is considered without reference to authorities, not one of the rights conferred on the preference shareholders are being disturbed by what is proposed. What is being done is within the powers of the company in general meeting under article 62. It was only if it was proposed to issue shares in priority to the preference shares that this could not be done without an extraordinary resolution passed by the members of the class at a separate meeting. Further, the proportion that the preference stock bears to the ordinary stock will be improved by

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[1] [1952] 2 All E.R. 751.

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what is proposed. Having regard to the facts and the articles of association it cannot be said that what is proposed will affect in any way the bundle of rights of the existing preference stockholders.

The material authorities are, first, *In re Mackenzie & Co. Ld.*,[2] where the material words of the particular article were that the rights of the preference shareholders were not without the sanction in writing of two-thirds of the class to be "altered, "modified, dealt with or affected in any manner whatsoever." The proposal was to reduce the company's capital, preferred and ordinary, and Astbury J. rejected the argument that the consent of the preference shareholders was required. The next case is *Greenhalgh* v. *Arderne Cinemas Ld.*[3] There as part of a transaction for advancing money the plaintiff had issued to him 1941 2s. shares with the like voting power as the other ordinary shares, which were 10s. shares. To meet this the proposal of these other shareholders was to divide each 10s. share into five 2s. shares so as to make their voting power five times greater. The court held that this would not vary the rights of the holder of the 1941 2s. shares. There Lord Greene M.R. said that the rights of the holders of the 1941 2s. shares "are affected, as a matter of business. As "a matter of law, I am quite unable to hold that, as a result "of the transaction, the rights are varied; they remain what they "always were." So here the rights of the preference shareholders are not affected in law by what is proposed even if it could be said that they were affected in value.

Neville Gray Q.C. and *Denis S. Chetwood* for the plaintiff. The order of the judge was the logical one and ought to be upheld. Where the word "affected" is added to all the other words in article 68, it must be treated as having a very wide meaning. It is the widest word of all those used. This view is supported by the latter part of article 62. The rights of preference stockholders are (1) the right to 5 per cent. interest, (2) the preferential rights conferred on them in a winding up, and (3) the voting rights expressly contemplated in article 62. Any member of the Stock Exchange would say that the voting rights of a majority of the preference stockholders would be affected by the proposed issue to the ordinary shareholders. We rely on the word "affected" and would say that the rights of the existing preference stockholders would clearly be affected: see *per* Lord Greene M.R. in *Greenhalgh*

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[2] [1916] 2 Ch. 450.

[3] [1946] 1 All E.R. 512.

v. *Arderne Cinemas Ld.*,[4] where he said the rights of the plaintiff were affected as a matter of business though not varied in law. The test here is not the value of the preference shares but it may be the value of the preference shareholders' rights. In *In re Mackenzie & Co. Ld.*[5] the whole argument was whether rights were " altered " or " modified " and the judge there said that the rights were not altered without saying whether they were affected. " Affected " is the widest term and it is contended that here the preference stockholders' rights would be affected by what is proposed.

The question whether they have a right to attend the general meeting under section 83 is of little importance and, if the plaintiff is not right as to the need for a class meeting under section 68, the question under article 83 is of little concern.

J. G. Strangman Q.C. in reply.

EVERSHED M.R. The question raised in this appeal is whether, according to the proper construction of the memorandum and articles of association of the Bristol Aeroplane Co. Ld., to which I will refer hereafter as " the company," the proposed distribution (by way of capitalization of undistributed profits) of fully paid-up preference and ordinary shares requires: (1) that a separate meeting of the existing preference stockholders should be summoned, and an extraordinary resolution in favour of the proposals passed thereat; and (2) that the existing preference stockholders should be summoned to attend, and vote at, the general meeting of the company.

Before I refer to the relevant articles, it may be convenient to state the existing capital position of the company. There have been issued, and are fully paid up, 600,000 preference shares of £1 each, since made into preference stock; in addition, there have been issued and paid up 6,600,000 ordinary shares of 10s. 0d. each, which have also been converted into £3,300,000 ordinary stock. The proposal is to increase the capital from its existing figure of £3,900,000 to £5,880,000, by the creation first of 660,000 new cumulative preference shares of £1 each, ranking pari passu in all respects with the present preference stock, so as to form a uniform class therewith, and second by the creation of 2,640,000 new ordinary shares of 10s. each, to rank on conversion into £1 stock pari passu in all respects with the existing ordinary stock. It should be pointed out that these new shares will all be distributed among the existing ordinary stockholders; it is therefore manifest that the ~~ordinary stockholders~~, by obtaining between them the 660,000 preference shares of £1 each, or its equivalent amount of stock, will, on a matter which has solely to be debated by preference stockholders, have a majority over the existing preference stockholders; and it is also manifest that upon a matter on which all the stockholders, preference and ordinary, debate together, the new ordinary stock to be issued will swell the total number of votes that can be cast by ordinary stockholders—although it is fair to add that the proportion of votes which ordinary stockholders will have as against preference stockholders will be reduced from the present ratio of about 11 to one to the smaller ratio of about seven-and-a-half to one.

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[4] [1946] 1 All E.R. 512, 519.

[5] [1916] 2 Ch. 450.

It has been the contention of the plaintiff, who is the representative of the preference stockholders—a contention which was successful in the court below—that the proposal now made falls within the ambit of certain clauses in the articles which I will read, so as to give the preference stockholders the right to a separate meeting, and to attendance at the general meeting of the company. I turn, therefore, at once to the articles, and I am bound to say that the draftsman has displayed a prolixity of expression which has, I think, given rise to the difficulty with which the company, and the court, are faced. It will be sufficient if I go at once to article 61, observing only that by a previous article, article 50, the words " share " and " shareholders " are later used as comprehending " stock " and " stockholders."

Article 61 sets out the present capital, and indicates the rights, or some of the rights—for it is not in this respect exhaustive—which belong to the preference stockholders. After stating the figures which I have already mentioned, the article proceeds: " The said preference stock shall confer upon the holders thereof " the right to a fixed cumulative preferential dividend at the rate " of five per cent. per annum on the capital paid up or credited " as paid up thereon, and the right in a winding up to repayment " of the capital paid up or credited as paid up thereon, together " with all arrears and accruals of the said preferential dividend " down to the date of such repayment, whether earned or " declared or not, before any return of capital is made on the " ordinary stock or shares, but shall not confer any further right " to participate in profits or assets."

There then follows a number of articles dealing with increase of capital, of which the most important is article 62, which I will read in full: " The company may from time to time, in general "meeting, whether all the shares for the time being authorized "shall have been issued, or all the shares for the time being "issued shall have been fully called up or not, increase its capital "by the creation of new shares, such aggregate increase to be of "such amount and to be divided into shares of such respective "amounts as the general meeting resolving upon the creation "thereof shall direct. Subject and without prejudice to any "rights for the time being attached to the shares of any special "class, any shares in such increased capital may have attached "thereto such special rights or privileges as the general meeting "resolving upon the creation thereof shall direct, or, failing such "direction, as the directors shall by resolution determine, and in "particular any such shares may be issued with a preferential, "deferred or qualified right to dividends or in the distribution of "assets and with a special or without any right of voting. No "shares shall be issued so as to rank in priority to the preference "stock referred to in article 61 either as to dividend or capital, "without the sanction of an extraordinary resolution passed at a "separate meeting of the holders thereof in manner provided in "article 68; but preference shares may without any such sanction "be created and issued so as to rank pari passu therewith, "provided that the total nominal amount of the preference "capital for the time being issued shall not exceed the total "nominal amount of the ordinary capital for the time being "issued and outstanding."

Article 63 provides for shares being offered to the existing members in a particular manner. Article 64 says: "Subject to "any directions that may be given in accordance with the powers "contained in the memorandum of association or these articles, "any capital raised by the creation of new shares shall be "considered as part of the original capital, and as consisting of "ordinary shares, and shall be subject to the same provisions "with reference to the payment of calls, transfer, transmission, "forfeiture, lien and otherwise as if it had been part of the "original capital."

Article 68 bears the familiar heading "Modification of "Rights," and it reads as follows: "Subject to the provisions of "section 72 of the Act"—that is, of the Companies Act, 1948, relating to the right of holders of special classes of shares to apply to the court in certain circumstances where variation of their rights is proposed; it is a section which does not apply in the present case—"all or any of the rights or privileges attached "to any class of shares forming part of the capital for the time "being of the company may be affected, modified, varied, dealt "with, or abrogated in any manner with the sanction of an "extraordinary resolution passed at a separate meeting of the "members of that class. To any such separate meeting all the "provisions of these articles as to general meetings shall . . . "apply."

I must next refer to article 83; and we now pass from the first point, whether there must be a separate meeting, to the second point, whether the preference stockholders are entitled to be present, and to vote, at the general meeting. Article 83 provides: "Subject to any special rights or restrictions for the "time being attached to any special class of shares in the capital "of the company, on a show of hands every member personally "present shall have one vote only, and in case of a poll every "member present in person or by proxy shall (subject as herein-"after provided) have one vote for every share held by him or in "the case of the said preference stock one vote for every £1 of "preference stock held by him or in the case of the said ordinary "stock one vote for every ten shillings of ordinary stock held "by him: Provided that preference shares or preference stock "shall not confer on the holders thereof the right in respect "thereof to receive notice of or to attend or vote at a general "meeting unless the dividend thereon is in arrear or unless the "meeting is convened to consider a resolution for winding-up or "to reduce capital or to consider a resolution directly affecting "their rights or privileges as a separate class"—and the last sentence is not material.

The only other articles to which I need allude are articles 131 and 132. Article 131, under the heading of "Dividends and "Reserve Fund," provides as follows: "Subject to any rights "or privileges for the time being attached to any shares in the "capital of the company having preferential, deferred or other "special rights in regard to dividends, the profits of the company "which it shall from time to time be determined to distribute by "way of dividend shall be applied in payment of dividends upon "the shares of the company in proportion to the amounts paid up "thereon respectively" as therein stated. Article 132 provides: "The directors may, with the sanction of a general meeting, "from time to time declare dividends," etc. Finally, it is under article 139 that the proposed scheme of capitalization is intended to be carried through; but I need not read that article.

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From what I have read it will be observed first, that the rights of the preference stockholders consist first of the right to priority in respect of the dividend of five per cent. on the paid-up capital—that is, in priority to any dividend paid to ordinary stockholders; secondly, that the preference stockholders have the right to repayment in a winding-up of capital and unpaid dividends on their shares before anything is distributed to the ordinary stockholders; and thirdly, that they have a qualified right to attend meetings and to vote. Their voting rights by reference to the amount of capital paid up are half those of the ordinary stockholders, and they are entitled to influence the transactions of the company only at meetings at which it is proposed to deal with subject-matters of the kind which I have read from article 83. They have also, to complete the matter, certain special rights to be separately summoned in case there is anything to be done affecting, modifying, varying, dealing with or abrogating in any way their other rights or privileges.

Those being the relevant articles, the question shortly is: will the effect of this proposed distribution, if carried out, be to "affect" the rights of the preference stockholders? I can state it thus briefly, because Mr. Neville Gray, for the plaintiff, has not sought to make any distinction between "rights" and "privileges," and he has, in view of certain authorities which I shall later mention, not contended that the proposals operate, or would operate, to "modify" or "vary," still less to "abrogate," the existing preference stockholders' rights; and, finally, Mr. Gray does not attach any separate significance to the words "dealt with."

The argument for the plaintiff, in its briefest form, is that this word "affect," particularly when followed at the end of the collection of words I have mentioned by the phrase "in any "manner," is a word of the widest import, and that it therefore must be taken to cover, and as having been intended to cover, a transaction which, though not in any way modifying or varying the rights, would in some way otherwise affect them; and, as Mr. Chetwood added in his few observations following those of his leader, if it has a meaning of that kind, the precise method whereby the result is arrived at cannot matter. On the other side it has been argued that this formula is in substance one of some antiquity; that there is authority for the view that no such broad and significant meaning should be given to the word "affected"; and further, that to give so broad a meaning to that word is not consistent with the inevitable implications of other parts of these regulations, particularly articles 62 and 64. The judge came to the conclusion that the plaintiff's contentions were well-founded, and he therefore granted injunctions to restrain the company from carrying out their proposed scheme of increase of capital and distribution of new shares, without first having a separate extraordinary meeting of the preference stockholders, and also summoning the preference stockholders to the general meeting of the company.

In so holding he followed an earlier decision of his own in *In re John Smith's Tadcaster Brewery Co. Ld.*,[1] an appeal from which is now pending in this court. The judge, in the latter case—and, indeed, I think, in the present case—expressed the view that the matter was not free from difficulty; nor, indeed, is it, and that is as the result, I venture to repeat, of the use of a multiplicity of words without perhaps ever considering what their significance, singly or in conjunction, might be. But with all respect to the judge, I have come to a conclusion different from that which he entertained. I think, approaching this matter for the moment as a matter of construction of these articles, and without reference to these earlier authorities, that you cannot sensibly give to this word "affected" the wide meaning for which the plaintiff has contended.

It is necessary, first, to note—although on this matter Mr. Gray has not argued to the contrary—that what must be "affected" are the rights of the preference stockholders. The question then is—and, indeed, I have already posed it—are the rights which I have already summarized "affected" by what is proposed? It is said in answer—and I think rightly said—No, they are not; they remain exactly as they were before; each one of the manifestations of the preference stockholders' privileges may be repeated without any change whatever after, as before, the proposed distribution. It is no doubt true that the enjoyment of, and the capacity to make effective, those rights is in a measure affected; for as I have already indicated, the existing preference stockholders will be in a less advantageous position on such occasions as entitle them to register their votes, whether at general meetings of the company or at separate meetings of their own class. But there is to my mind a distinction, and a sensible distinction, between an affecting of the rights and an affecting of the enjoyment of the rights, or of the stockholders' capacity to turn them to account; and that view seems to me to flow necessarily from certain other articles which I have already read.

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[1] [1952] 2 All E.R. 751.

Let me take first of all article 62; it is divided, so to speak, into three sections. The first indicates that the company may from time to time in general meeting increase the share capital by creating new shares. Up to that stage, no particular characteristics or rights are attached to the new shares created, and should nothing else be done to give them special character, article 64 automatically makes them ordinary shares. As a matter of construction of so much of the article, I find it impossible to hold at that stage that increasing the capital by creating new shares involves an " affecting " of the preference stock—though, of course, if the matter be analysed sufficiently, it is obvious that the result of so doing in some measure, for better or for worse, touches the way in which in the future preference stockholders may turn to account that which they have. You then get the second part of article 62, which introduces for the first time the warning that what follows is without prejudice to the rights of " special classes," by which it is conceded that at least for present purposes the preference stockholders are meant. Without prejudice to them, shares in such increased capital may have attached to them special rights or privileges as to dividends, and in particular as to voting. There again, that second section seems to me to indicate that it is only when these new shares are given special privileges of one kind or another, you may come into conflict with the rights attached to the existing special classes; so that this second step may be capable of being taken only after you have done what has to be done in the way of calling a separate meeting and so forth.

Then the matter is carried still further by the third, and perhaps most significant, part of this article: " No shares shall " be issued so as to rank in priority to the preference stock . . . " without the sanction of an extraordinary resolution passed at " a separate meeting of the holders thereof in manner provided " in article 68." But the article goes on to provide: " but " preference shares may without any such sanction be created " and issued so as to rank pari passu therewith," subject only to the one limitation that this must not be done to such an extent that the total amount of paid-up preference capital exceeds that of the ordinary capital, and so, I assume, leaves to the preference stockholders an insufficient basis of security over the ordinary issued capital.

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Without going into too much detail, I cannot make those articles consistent with the view that any variation which in any manner touches or affects the value of the preference stock, or the character or enjoyment of any of their privileges, is within the contemplation of article 68. I think that Mr. Gray had to admit, going still further, that even a deliberate increase of new ordinary shares to rank pari passu with the existing ordinary shares, would on this view of it make necessary separate meetings of the existing preference stockholders and also of the existing ordinary stockholders. I cannot think that such a result ought to be attributed to articles which are, after all, fairly well known as common form. Such a result seems to me to strike at the usual conception of the relations, in a company of this sort, of preference and ordinary stockholders, where the former take their rights subject always to the normal incidence of the company's right to increase its capital.

I also obtain some assistance from article 83, in two ways. First, with regard to the actual wording—though in documents of this sort I do not attach too much importance to the precise language—instead of a repetition of the phrase " may be affected, " modified, varied, dealt with, or abrogated," in article 68 you get the single phrase " directly affecting "; which leads me to the conclusion that " directly affecting " in this article and in this context cannot have so broad and general a meaning as the plaintiff contends. Second, I notice that a resolution to reduce capital is regarded as in itself such as to require the summoning of the preference stockholders to the meeting and as something therefore distinct from a resolution " directly " affecting " their rights. Also I do not forget Mr. Strangman's point that even the payment of dividends might, on the broadest view, affect the rights of a preference stockholder. I quite agree that the court ought not, unless it is unavoidable, to reduce to mere futility a particular word which has apparently been deliberately introduced; but I do not think that it is necessary to go so far.

Examples were put, in the course of the argument, which I think might well answer the question: to what does the word " affected," as distinct from " varied," apply? For example, it might be—though I express no view on it—that a resolution aimed at increasing the voting power of the ordinary stockholders by doubling it, so giving them twofold their present power, without altering any other of the privileges or rights attached to any class, might be said to be something so directly touching the position, and therefore the rights, of the preference stockholders, having regard to the statement of the voting rights in article 83, as to be within the ambit of article 68, albeit that there was no variation of their own individual rights. That case is not before us, and I mention it only to indicate that I am not persuaded that the conclusion which I have indicated involves the result that no meaning, as distinct from variation, can be given to the word "affected."

I must say a word now about the earlier cases. Of Danckwerts J.'s earlier decision I propose to say nothing—all the more, because the case will shortly be coming before this court—save that the articles in that case were not the same as the present articles. There was nothing in the *Tadcaster* case [2] to correspond with the second and third parts, for example, of article 62 in the present case, and Mr. Strangman pointed out other differences, to which I need not allude.

I go back at once to the case which may be said to have been the founding authority in cases of this sort, *In re Mackenzie & Co. Ld.*,[3] before Astbury J. In that case there were, as here, preference shareholders or stockholders and ordinary shareholders or stockholders. The former had the right to a preferential dividend, but they had no right to priority as to capital in a winding-up. The company proposed to reduce its capital and to make the reduction a rateable reduction upon all the shares, preference and ordinary alike. Objection was taken that the written consent of the preference shareholders as a special class was required. The relevant clause in the memorandum there was in substantially the same form as article 64 and provided: "Subject to any express provision to the contrary made upon "the creation of any class of shares, all or any of the special "rights, privileges and advantages attached to any class may, "with the sanction in writing of the holders of two-thirds of the "issued shares of the class (but shall not without such sanction), "be altered, modified, dealt with or affected in any manner "whatsoever." The argument, it is true, appears to have proceeded solely upon the two words "altered" or "modified." I observe, however, having regard to the argument of the leading counsel who appeared for the opposing preference shareholders, that the judge was most careful in his judgment, so far as I can see, to avoid using any one of the four words used in the article. But if the argument of the appellant company here is correct, I should have thought it inevitable that the rights of the preference shareholders there were in a broad sense "affected." True, the rights as stated in the article remained, namely, the right to receive four per cent. on the nominal amount of the capital from time to time paid up or credited as paid up; but in the business sense, in truth and in substance, the effect of what was done was to reduce by an amount corresponding to the amount of the reduction the total dividends of the preference shareholders. The judge rejected the argument (without, as I have said, referring to any one of the four words used in the article) that the preference shareholders were entitled to be separately summoned to an extraordinary meeting, or rather required to sign the necessary consent.

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[2] [1952] 2 All E.R. 751.

[3] [1916] 2 Ch. 450.

The other case which has been referred to is the case in this court of *Greenhalgh* v. *Arderne Cinemas Ld.*[4] In that case the plaintiff had, as part of a transaction for advancing money to the defendants, obtained the issue to him of a number of what were called "1941 2s. 0d. shares," and it was one of the terms of the original arrangement that each of those shares should, as regards voting, rank pari passu with the other issued ordinary shares of the company, which happened to be 10s. 0d. shares; so that, in effect, so long as that arrangement stood in relation to the actual paid-up capital, the plaintiff had five times as many votes as the other shareholders. The proposal, on behalf of the other shareholders, was to reverse the situation by subdividing the existing shares, so that at a stroke their voting power was made five times as great. Not unnaturally the plaintiff strongly objected, and among other points taken by him was the point that they could not do so without first calling a separate meeting of the 1941 2s. 0d. shares, treating them as a separate class; and the court proceeded to consider that matter on the footing that the 1941 2s. 0d. shares were a separate class. It is important to observe that the relevant modification of rights article was the much less verbose article taken from Table A. That said: "If "at any time the share capital is divided into different classes "of shares, the rights"—and they did not bother to add "privileges" or "advantages," or anything like that—"may "be varied"—and they did not add "altered," "modified," "affected," "disturbed," "dealt with," or "abrogated"— "with the consent in writing of the holders of three-fourths of

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[4] [1946] 1 All E.R. 512.

"the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class." So that all this court had to consider was whether this proposal of the other ordinary shareholders in the company involved a variation of Mr. Greenhalgh's rights as a substantial holder of the 1941 2s. 0d. ordinary shares. This court said not; but Mr. Gray has pointed out, and has laid emphasis upon the circumstance, that Lord Greene M.R., who delivered the leading judgment, apparently did not observe that the word "affected" did appear in the *Mackenzie* case.[5]

I make two references to Lord Greene's judgment in the *Greenhalgh* case,[6] where he said: "Several authorities have been "cited, but the only one, I think, which throws any light on the "matter is *In re Mackenzie & Co.*,[7] a decision of Astbury J., "which I do find, up to a point, helpful. It was a case of a "petition for reduction of capital, and under the memorandum "and articles the only right of the preference shareholders was "to have a fixed cumulative preferential dividend of a certain "amount. A rateable reduction of all the shares, preference and "ordinary, was proposed to be carried out, subject to the sanction "of the court. All the shares, preference and ordinary, suffered "the rateable reduction, and the result of that was that the "dividend rights of the preference shareholders were substantially "affected because, by reducing their capital, as they were only "entitled to a fixed cumulative preferential dividend on the "nominal amount of their capital for the time being paid up, it "reduced the dividend accordingly, although the dividend still "remained at four per cent. That reduction operated in a certain "way to the benefit of the ordinary shareholders, who were "entitled to what is commonly called the equity."

Then a little later he said[8]: "Astbury J. pointed out that the "only dividend right was a right to four per cent., per annum on "the nominal amount of the capital from time to time paid up "or credited as paid up, and that, under the articles, the "company had power to reduce its capital." Then Lord Greene quoted from Astbury J.[9]: "'The result of the memorandum and "'articles shortly is this. Subject to the right of the company "'to reduce its capital by the votes of the ordinary shareholders "'in any manner sanctioned by statute these preference shares "'are to be of the denomination of £20 each, and the only

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[5] [1916] 2 Ch. 450.

[6] [1946] 1 All E.R. 512, 517.

[7] [1916] 2 Ch. 450.

[8] [1946] 1 All E.R. 512, 517.

[9] Ibid. 517.

" 'special right, privilege, or advantage attached to those shares " 'is a cumulative four per cent. preferential dividend on the " 'nominal amount of capital from time to time paid up or " 'credited as paid up thereon.' " Later Lord Greene used these words[10]: "As Vaisey J. pointed out, and I agree, the effect of "this resolution"—that is, the resolution in the *Greenhalgh* case[11]—"is, of course, to alter the position of the 1941 2s. "shareholders. Instead of Greenhalgh finding himself in a "position of control, he finds himself in a position where the "control has gone, and to that extent the rights of the 1941 "2s. shareholders are affected, as a matter of business. As a "matter of law, I am quite unable to hold that, as a result of "the transaction, the rights are varied; they remain what they "always were," and so on.

I cannot attach such importance to the use by Lord Greene of the word "affected" as to lead me to conclude that the authority of the *Greenhalgh* case[11] depends, and depends entirely, upon the circumstance that in the relevant clause the only word which had to be construed was "varied"; I agree that Lord Greene used the word "affected," but I draw attention to the fact that the distinction was not between "affected" and "varied," but between "affected as a matter of business" and "varied as a matter of law." I have no doubt, as I have already indicated, that upon a sufficient analysis what is here suggested will "affect" the preference stockholders "as a matter of business"; but we are concerned with the question whether the rights of the preference stockholders are "affected," not as a matter of business, but according to the articles, that is, according to their meaning construed under the rules of construction and as a matter of law. I further think that having regard to the fact that the word "affected" was in the article in the *Mackenzie* case,[12] it would be wrong for this court now to say that its presence in this set of articles—and I dare say it has appeared in many others before and since that case—has so restrictive an effect upon the ordinary shareholders in the company that separate meetings of preference stockholders and shareholders would have to be held whenever it could be shown that as a matter of business, upon a close analysis, that which was proposed would, or might, affect in some degree the value of the preference shares, or the way in which the rights conferred upon them by the regulations of the company were to be enjoyed.

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[10] [1946] 1 All E.R. 512, 517.

[11] Ibid.

[12] [1916] 2 Ch. 450.

The result is that, with all respect to the judge, I have come to the conclusion that the preference stockholders' claim in this case is not well-founded—or perhaps I should say, as this is an appeal from an order made on a motion, that the plaintiff has not satisfied me that any such interlocutory relief as he asked for on the motion ought to be granted to him.

In those circumstances the appeal will be allowed.

Denning L.J. I agree.

Romer L.J. I also agree. I add only a few words, partly because we are differing from Danckwerts J. and partly because this case may, I imagine, have a certain importance in commercial circles, and amongst practitioners in company law.

The plaintiff's case is that the rights attached to the class of preference stockholders whom he represents are being "affected" within the meaning of article 68 of the company's articles of association; and plainly, therefore, the first question to be asked is: of what do those rights consist?—because until that is known it is impossible to form a view whether they are being affected.

The rights attached to a class of shares within the meaning of such an article as this, are those attached by the resolutions creating such shares or by the articles of association of the company as amended from time to time by any relevant resolution; and accordingly, regard must be had to such resolutions and to the constitution of the company for the purpose of finding out what the rights of the preference stockholders are.

The rights attaching to the preference stockholders are those which are conferred by articles 62 and 83; and the only relevant article for present purposes is article 83. Under that article it is provided, as my Lord has already stated, that on a poll every member present in person or by proxy shall have one vote for every share held by him, or in the case of the preference stock, one vote for every £1 of preference stock held by him. It is suggested that, as a result of the proposed increase of capital, that right of the preference stockholders will in some way be "affected"; but I cannot see that it will be affected in any way whatever. The position then will be precisely the same as now—namely, that the holder of preference stock will have on a poll one vote for every £1 of preference stock held by him. It is quite true that the block vote, if one may so describe the total voting power of the class, will, or may, have less force behind it,

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because it will pro tanto be watered down by reason of the increased total voting power of the members of the company; but no particular weight is attached to the vote, by the constitution of the company, as distinct from the right to exercise the vote, and certainly no right is conferred on the preference stockholders to preserve anything in the nature of an equilibrium between their class and the ordinary stockholders or any other class.

During the course of the discussion I asked Mr. Gray whether it would not be true to say that the logical result of his argument would be that the rights of ordinary shareholders would be affected by the issue of new ordinary capital on the ground that every one of the considerations on which he was relying would be present in such a case. The votes of the existing shareholders would be diminished in power; and they would have other people with whom to share the profits, and, on a winding-up, to share the capital assets. In answer to that he was constrained, I think rightly, to say that was so. But in my opinion it cannot be said that the rights of ordinary shareholders would be affected by the issue of further ordinary capital; their rights would remain just as they were before, and the only result would be that the class of persons entitled to exercise those rights would be enlarged; and for my part I cannot help thinking that a certain amount of confusion has crept into this case between rights on the one hand, and the result of exercising those rights on the other hand. The rights, as such, are conferred by resolution or by the articles, and they cannot be affected except with the sanction of the members on whom those rights are conferred; but the results of exercising those rights are not the subject of any assurance or guarantee under the constitution of the company, and are not protected in any way. It is the rights, and those alone, which are protected, and for the reasons which my Lord has given, and in view of what I have myself said, the rights of the preference stockholders will not, in my judgment, be affected by the proposed resolutions.

I accordingly agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Stanley & Co.; E. F. Turner & Sons.*

H. C. G.

MORGAN AND ANOTHER *v.* GRAY AND OTHERS.

1952
Dec. 19.

Danckwerts J.

[1952 M. 4591.]

Company—Bankruptcy of shareholder—Right of bankrupt to vote while registered.

There is no enactment which provides that a shareholder of a company, who is adjudicated bankrupt, but whose name remains on the register, ceases to be a member and loses the right to vote or tender a proxy at meetings of the company, provided that the company is not in liquidation.

A bankrupt can, accordingly, exercise such rights while his name remains on the register, unless there is some express provision to the contrary in the company's articles of association. Such vote must be exercised in accordance with the direction of the persons beneficially entitled.

Wise v. *Lansdell* [1921] 1 Ch. 420 considered; *In re Cape Breton Co.* (1881) 19 Ch.D. 77 distinguished.

MOTION.

In April, 1952, the plaintiff Morgan and the defendant L. A. Gray were the sole directors and shareholders in British Ethical Proprietaries Ld., each holding 50 shares of £1 out of a total authorized and issued capital of £100. Article 18 of the company's articles of association provided: "The qualification of a "director shall be the holding of at least fifty shares in the "company of an aggregate value of £50. . . . A director may "act before acquiring his qualification"; and by article 16 the number of directors was to be not less than two, unless otherwise determined by the company in general meeting. On April 30, 1952, Morgan was adjudicated bankrupt, and vacated office as a director by virtue of article 23.

On August 6, 1952, Gray appointed his wife, the second defendant, to be a director. He then called an extraordinary general meeting of the company for August 29, for the purpose of passing a resolution to delete articles 16 and 18. This meeting was attended by Morgan, who sought to vote and tendered proxies in the alternative on his own behalf and on behalf of his trustee in bankruptcy, the second plaintiff. Gray refused to allow Morgan to vote, or to accept the proxies tendered; acting under the provisions of article 46 of Table A of the Companies Act, 1929, which was largely incorporated in the company's articles, he declared that there was no quorum; adjourned the meeting for one week; and at the adjourned meeting on September 6, declared the resolution carried, again rejecting the plaintiff's vote and proxies.

The annual general meeting of the company was called for October 18, a notice being sent to the plaintiff trustee. Proxies in the alternative for the plaintiffs were again tendered and were rejected by Gray, who adjourned the meeting for want of a quorum. At the adjourned meeting on October 25, a resolution was passed purporting to appoint Mrs. Gray a director.

The plaintiffs, who contended that Morgan's votes and proxies had throughout been improperly rejected, brought an action against Mr. and Mrs. Gray and the company, claiming injunctions to restrain the defendants from acting on the purported resolutions deleting articles 16 and 18, and appointing Mrs. Gray as a director.

By article 7 of the articles of association: "No person shall "be recognized by the company as holding any share upon any "trust, and the company shall not be bound by or recognize any "equitable, contingent, future or partial interest in any share or "any interest in any fractional part of a share, or (except only "as by these presents otherwise expressly provided) any other "right in respect of any share except an absolute right to the "entirety thereof in the registered holder."

The company's articles incorporated the following provisions of Table A of the Companies Act, 1929:—

Article 22: "A person becoming entitled to a share by reason "of the death or bankruptcy of the holder shall be entitled to the "same dividends and other advantages to which he would be "entitled if he were the registered holder of the share, except "that he shall not, before being registered as a member in "respect of the share, be entitled in respect of it to exercise any "right conferred by membership in relation to meetings of the "company."

Article 46: "If within half an hour from the time appointed "for the meeting a quorum is not present, the meeting, if "convened upon the requisition of members, shall be dissolved; "in any other case it shall stand adjourned to the same day in "the next week, at the same time and place, and if at the "adjourned meeting a quorum is not present within half an hour "from the time appointed for the meeting the members present "shall be a quorum."

Article 54: "On a show of hands every member present in "person shall have one vote. On a poll every member shall "have one vote for each share of which he is the holder."

Article 106: "A notice may be given by the company to the "persons entitled to a share in consequence of the death or "bankruptcy of a member by sending it through the post in a "prepaid letter addressed to them by name, or by the title of "representatives of the deceased, or trustee of the bankrupt, or "by any like description, at the address, if any, within the United "Kingdom supplied for the purpose by the persons claiming to "be so entitled, or (until such an address has been so supplied) "by giving the notice in any manner in which the same might "have been given if the death or bankruptcy had not occurred."

Article 107: "Notice of every general meeting shall be given "in some manner hereinbefore authorized to (a) every member "except those members who (having no registered address within "the United Kingdom) have not supplied to the company an "address within the United Kingdom for the giving of notices to "them, and also to (b) every person entitled to a share in "consequence of the death or bankruptcy of a member, who, but "for his death or bankruptcy, would be entitled to receive notice "of the meeting. No other persons shall be entitled to receive "notices of general meetings."

Harold Lightman for the plaintiffs. When a shareholder is made bankrupt, his property vests in his trustee in bankruptcy, but the trustee does not become a member of the company; his interest is beneficial only, so long as the bankrupt's name appears on the company's register.

The bankrupt has the right to vote at meetings, or to tender a proxy, but he must exercise his vote as directed by the trustee, and can be restrained by injunction for failing to do so. There is nothing in the present articles which takes away that right.

In *Wise* v. *Lansdell*[1] a bankrupt was treated as having the right to vote; that case also shows that there is no statutory bar to that right. This case is even stronger, as the first plaintiff is seeking to represent his trustee, not a mortgagee.

This argument is only applicable where the company is a going concern; when it is in liquidation, section 216 of the Companies Act, 1948, provides that a bankrupt cannot be a contributory.

Harold Christie Q.C. and *Brian Parker* for the defendants. By section 38 of the Bankruptcy Act, 1914, property held by the bankrupt in trust does not vest in his trustee; in *Wise* v. *Lansdell*[1] the bankrupt was a trustee for mortgagees, so that case is hardly in point.

[1] [1921] 1 Ch. 420.

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A bankrupt may remain for a time on the register, but it is submitted that he ceases to be a member of the company; everything that he had has been taken away. There is no provision in the Bankruptcy Acts for the exercise by the bankrupt of any such right as that now claimed.

[They referred to *Motion* v. *Moojen*[2] and *In re Cape Breton Co.*[3]]

DANCKWERTS J. [after stating the facts]:—It is claimed on behalf of the plaintiffs that, as the plaintiff Morgan remained on the register of the company throughout the whole of these material dates, he remained entitled to vote at those meetings, and that his vote in person when he was present and his proxies which would have been available if he had been allowed to demand a poll, or if his representatives had been allowed to demand a poll, were improperly disallowed; and, therefore, that the resolutions were not properly passed at the adjourned meetings in those cases.

It is curious that apparently it has never been decided whether, in spite of bankruptcy, a member of a company who remains a registered proprietor of shares on the company's register can continue to vote. It is no doubt the case that, if he can vote, he must exercise those votes in accordance with the direction of the persons beneficially entitled to the shares, which in the present case would, of course, be his trustee in bankruptcy, because the beneficial interest in his shares at any rate would have vested in the trustee in bankruptcy.

I was referred by Mr. Lightman to *Wise* v. *Lansdell*,[4] which is an interesting case in some ways, as Astbury J. treated the bankrupt member still on the register as entitled to vote; but the circumstances were somewhat different, as in that case the persons who would be entitled to direct those votes were mortgagees, and the equity of redemption in the shares in question had been disclaimed by the trustee; consequently, so far as the trustee was concerned, he had no further interest in the shares, and in fact the bankrupt simply was a trustee for the mortgagees.

Mr. Christie, on the other hand, relied upon two cases to which he referred me, first, *Motion* v. *Moojen*,[5] which did not seem to me to affect the matter very much. It merely depended upon the general principle that a bankrupt cannot sue, but an action can be brought by the trustee in bankruptcy.

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[2] (1872) L.R. 14 Eq. 202.

[3] (1881) 19 Ch.D. 77.

[4] [1921] 1 Ch. 420.

[5] L.R. 14 Eq. 202.

A case of more interest was *In re Cape Breton Co.*[6] There, in the case of a company in liquidation, it was held that the bankrupt was not a contributory, and, therefore, that he was a stranger to the company, and could not interfere in regard to the administration of the company's affairs in its liquidation; but it seems to me that that case has nothing whatever to do with the present one, because there was in section 77 of the Companies Act, 1862, a provision similar to that which is now to be found in section 216 of the Companies Act, 1948, in these terms: "If a "contributory becomes bankrupt, either before or after he has "been placed on the list of contributories,—(*a*) his trustee in "bankruptcy shall represent him for all the purposes of the "winding up, and shall be a contributory accordingly, and may "be called on to admit to proof against the estate of the bank"rupt, or otherwise to allow to be paid out of his assets in due "course of law, any money due from the bankrupt in respect of "his liability to contribute to the assets of the company. . . ."

Those words are very strong. It is plain that the trustee in bankruptcy is the contributory and the bankrupt is not, and, therefore, it plainly follows that the bankrupt has no status at all in the winding up of the company and cannot be allowed to interfere.

The position is very different where the company is still in operation and the bankrupt remains the registered proprietor on the company's register of the shares which he formerly owned beneficially as well as legally. It seems to me that, unless there is some provision in the company's articles or in the Companies Act which empowers me to say that the bankrupt is no longer a member of the company, and is, therefore, unable to vote, expressly, I must come to the conclusion that the bankrupt still remains a member as long as he is on the register; notwithstanding that by taking appropriate steps under the appropriate provisions the trustee in bankruptcy may be able to secure registration of himself as the proprietor of the shares. Unless and until that is done, and as long as the bankrupt remains on the register of the company, he remains a member in respect of those shares and is entitled, as it seems to me, to exercise the votes which are attributable to that status, notwithstanding that he has no longer any beneficial interest in the

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[6] 19 Ch.D. 77.

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shares and that the company is entitled to pay any dividends to his trustee in bankruptcy.

It seems to me, therefore, that at all material times in the present case the person who was the proprietor of the 50 shares not held by Mr. Gray was Mr. Morgan, and that Mr. Morgan was entitled to attend the meetings of the company, even though he might not be able to demand that notices of general meetings should be sent to him and not to his trustee in bankruptcy. If he attended, as long as he was on the register he was entitled to vote; and as long as he was on the register he was entitled to give proxies for somebody else to vote on his behalf.

Accordingly, in my judgment, the resolutions on which the defendant company relies should not have been passed.

I will make an order that the defendants be restrained from acting upon a special resolution that the articles of association of the defendant company be altered by the deletion of articles 16 and 18 therefrom, alleged to have been passed on September 5, 1952; and an order restraining the defendants and each of them from acting upon an alleged resolution at the adjourned annual general meeting of the defendant company confirming the appointment of the defendant Mabel Muriel Gray.

[The hearing of the motion was, by consent, treated as the trial of the action.]

Solicitors: *McKenna & Co.; Stafford Clark & Co.*

F. R. D.

1953
Jan. 22, 23.

Vaisey J.

In re COHEN, DECD. NATIONAL PROVINCIAL BANK LD. *v.* KATZ.

[1950. C. 3865.]

Husband and Wife—Possession—Presumption of ownership—Death of husband followed by that of wife—Matrimonial home at all times the property of the wife—Discovery in matrimonial home after the death of wife of hidden bundles of banknotes—No evidence of ownership or of circumstances as to hiding of notes—Whether husband's or wife's estate entitled.

A gown manufacturer with a business in the East end of London lived for a number of years with his wife in a flat at Brighton, which was the property of the wife. The husband died in April, 1948; the wife in the following August. Both left wills, of which the plaintiffs were executors and trustees.

After the wife's death, quantities of banknotes and coin, amounting to some £5,944, were discovered in the flat; these were hidden in a number of unlikely and unsuitable places: inside a radiogram, under a kitchen cabinet, etc. There was no evidence as to the ownership of the money, or as to when, by whom, or for what reason it had been secreted.

On the hearing of a summons taken out for the determination of the question whether the money belonged to the husband's estate, or to the wife's, or to both estates, and if the latter in what proportions:—

Held, that in the absence of any trustworthy evidence of ownership, recourse must be had to the legal presumption that the owner of land is prima facie the owner of chattels found on the land, so that the wife's estate was entitled to the money.

South Staffordshire Water Co. v. *Sharman* [1896] 2 Q.B. 44; 12 T.L.R. 402, and *Johnson* v. *Pickering* [1907] 2 K.B. 437; 23 T.L.R. 579, applied.

Semble, that if (as was the most likely guess that could be made on the available evidence) the money was secreted as a "nest-egg" against an emergency, the principle of equality in matrimonial financial transactions laid down in *Jones* v. *Maynard* [1951] Ch. 572; [1951] 1 T.L.R. 700; [1951] 1 All E.R. 802, and *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863, should be applied only to the extent that the money should be considered as subject to an equal and severable joint tenancy in the joint lifetime of the spouses; while after the death of one it would remain for the sole benefit of the survivor; in which event also the wife's estate was wholly entitled.

ADJOURNED SUMMONS.

Max Cohen, a gown manufacturer carrying on business in the East End of London, and his wife Rebecca, lived at all material times in a flat at Brighton, which was the property of the wife. Both were almost illiterate, but the husband's business was highly successful. Both died in 1948, the husband in April, and the wife in August; both left wills, of which the plaintiffs were executors and trustees.

After the death of the wife it was discovered that banknotes and coin to the value of £5,944 13s. 6d. had been hidden in the flat. Bundles of notes were found in a number of peculiar and unlikely places, such as a space behind a water tank on the landing; a locked tin box behind a wardrobe; underneath a kitchen cabinet; and in a trunk containing female clothing. There was no evidence as to the origin of the money, or as to when, or by whom, or for what purpose the money had been secreted in this way. It had, however, been ascertained, and was stated in affidavits, that the husband had, over a number of years, withdrawn many thousands of pounds from his business; and that the wife, about a year before her death, had withdrawn some £1,500 from a bank deposit account.

After the death of the wife a number of questions arising out of the two wills fell to be decided; Wynn-Parry J., who heard the summons, gave certain directions now immaterial, and ordered an inquiry in chambers as to the question whether the notes and coin discovered in the flat belonged to the estate of the testator or to that of the testatrix, or partly to one estate and partly to the other, and if so, in what proportions. At the conclusion of the inquiry the master found himself quite unable to answer the question, owing to the lack of definite evidence, and concluded his certificate by leaving the question for the court.

B. S. Tatham for the plaintiffs.

Hubert A. Rose for beneficiaries of the wife's estate. The evidence available is very slight, and it is difficult to see what inference as to ownership can be derived from it.

Assuming that no reasonable inference of fact can be drawn, the court has to fall back on presumptions of law. Here, the testatrix was the freeholder, and there is a presumption that the freeholder is entitled to chattels unaccountably found on land. In *South Staffordshire Water Co.* v. *Sharman* [1] rings were found in a pond, and the freeholder was held to be entitled to possession as against the finder. That case was distinguished in *Hannah* v. *Peel*,[2] but there the freeholder had never been in possession. In *Johnson* v. *Pickering* [3] (reversed on appeal, but on a distinct ground) it was said that the doctrine was not limited to objects found on the ground or on a floor, but extended to objects found inside other chattels; that would apply in the present case, e.g., to the bundles found in the radiogram and tin box.

Accordingly, at the wife's death, she must be presumed to have been in possession of the hoard; and as no better title has been shown, her estate is solely entitled to the ownership of it.

[Vaisey J. On the facts so far as known it might be suggested that the money was a nest-egg put away for the benefit of the survivor.]

I welcome and adopt that suggestion.

L. H. L. Cohen for beneficiaries of the husband's estate. If, on the facts, it cannot be said that the husband's estate should take the whole, there should be an equal division.

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[1] [1896] 2 Q.B. 44.

[2] [1945] K.B. 509.

[3] [1907] 2 K.B. 437.

It would be wholly artificial to apply the presumption that a freeholder is entitled to casually found chattels to a case concerning a husband and wife. In the absence of evidence of the fact of ownership or of the intention of the spouses the principle of equality laid down in *Jones* v. *Maynard*,[4] and approved in *Rimmer* v. *Rimmer*,[5] should be applied.

G. A. Rink for other beneficiaries of the wife's estate. As the flat was the wife's, prima facie possession was in the wife, and possession is prima facie evidence of ownership: *Mason* v. *Lickbarrow*.[6] [He also referred to *Ramsay* v. *Margrett*,[7] *French* v. *Gething*[8] and *Youngs* v. *Youngs*.[9]]

Alternatively, if both spouses are taken to have contributed to the hoard, it would be possible to apply the principle that when the goods of two owners become mixed they are prima facie to be treated as tenants in common of the whole: *Sandeman & Sons* v. *Tyzack and Branfoot S.S. Co. Ld.*[10]

VAISEY J. [after stating the facts:] I venture to describe this couple as having had some of the characteristics usually associated with magpies. They hid their money all over the flat in unsuitable situations, and, in all, a sum of £5,944 13s. 6d. was found concealed there.

The neighbours who were living on other floors of the same building disclaimed any knowledge of what was happening. Whether the husband and wife were none too sure of the solvency of banks, or of the Post Office; what they were doing, whether they were keeping it where they did because it seemed to be the safest place to keep it; whether it was money which represented the proceeds of the sale of some property; how long they had had it; where it came from; why they hid it; what they were doing with it and what their purpose was, nobody seems to have any idea; and we are left with the bare fact that on the death of Rebecca Cohen all this money was concealed in most unsuitable situations in the flat in which the parties had resided.

It is the kind of human story which invites speculation; and I could, I think, make some fairly ingenious guesses as to what might be the explanation of it all; but there is no kind of real certitude in the matter. There are certain circumstantial details about the hiding; for instance, some of the notes were wrapped

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[4] [1951] Ch. 572.

[5] [1953] 1 Q.B. 63.

[6] (1790) 1 H.Bl. 357, 360.

[7] [1894] 2 Q.B. 18.

[8] [1922] 1 K.B. 236.

[9] [1940] 1 K.B. 760.

[10] [1913] A.C. 680, 694.

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in black cotton material similar to that used in the loud-speaker of the radiogram. Apparently the notes, after they were discovered, were paid into a bank or otherwise disposed of without careful inspection, but from the evidence, so far as it goes, it would seem they were ordinary, fairly dirty notes; the sort of collection of notes which might have been made from time to time.

I have looked at the affidavits which were before the master to see if I could find anything more in them than he was able to find, but I have come to much the same conclusion that he did, which is that there is really nothing to throw any light on the mystery, for a mystery it is.

Now, with the conflicting claims of the beneficiaries under the two wills, I have somehow or other to decide to which estate this money belongs. Nobody can say that it is res nullius, an expression used in *Sinclair* v. *Brougham* [1]; it must belong to someone; and as I cannot hold that it is res nullius it is obvious that no claimants other than the beneficiaries of the two estates could be heard to assert any right to it.

First of all, as a question of fact, there is not the slightest indication to whom this money belonged. There is no suggestion that the husband and wife, who, as I was told, were living together in perfect amity, ever made any agreement about it between themselves. Not only is there no kind of evidence as to the source of this money, but there is none as to what was the purpose of the owner of it in depositing it in this extraordinary way in various places in the common conjugal dwelling.

Sometimes the only way out of a difficulty of this kind is to treat the claimants as entitled in equal shares, and that is a solution which has been adopted on many occasions by the court; but there is one material fact to which I must now refer, which is this: this house, No. 19 Montpelier Villas, was the freehold property of the wife; that is to say, the legal estate was in her. Whether she held as nominee or trustee for her husband, whether they had made any arrangement as between themselves for a tenancy or anything of that kind, I do not know; but the fact is that she was the legal owner of the house in which they lived and in which this money was found.

There is a consistent line of cases which shows that there is a legal presumption that the owner of land is the owner of chattels found on the land; and for that proposition see *South Staffordshire Water Company* v. *Sharman*.[2] The headnote is as follows: "The possessor of land is generally entitled, as against "the finder, to chattels found on the land. The defendant, while "cleaning out, under the plaintiffs' orders, a pool of water on "their land,"—that is the well-known Minster Pool at Lichfield —"found two rings. He declined to deliver them to the plain-"tiffs, but failed to discover the real owner. In an action of "detinue:—*Held*, that the plaintiffs were entitled to the rings." The judgment of Lord Russell of Killowen C.J. concludes with these words[3]: "the general principle seems to me to be that "where a person has possession of house or land, with a manifest "intention to exercise control over it and the things which may "be upon or in it, then, if something is found on that land, "whether by an employee of the owner or by a stranger, the "presumption is that the possession of that thing is in the owner "of the locus in quo."

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[1] [1914] A.C. 398, 458; 30 T.L.R. 315.

A further authority dealing with the point is *Johnson* v. *Pickering*,[4] in which this passage occurs in the judgment of Lawrance J.[5]: "The tendency of modern authorities is to make "an intention to possess the test, in the absence of more direct "evidence, of actual possession." Then *South Staffordshire Water Company* v. *Sharman*[6] was cited, and I think cited with approval.

The questions of possession, of what amounts to possession, from what possession may be inferred, and when possession can be deemed to indicate ownership, are questions as to which there is much authority and may be much controversy. Certain principles are laid down, for instance, in *Mason* v. *Lickbarrow*,[7] which contains a passage[8] where it is said: "Possession of "goods is prima facie evidence of title; but that possession may "be precarious, as of a deposit; it may be criminal, as of a thing "stolen; it may be qualified, as of things in the custody of a "servant, carrier, or a factor. Mere possession without a just "title gives no property, and the person to whom such possession "is transferred by delivery must take his hazard of the title of "his author."

The question of possession of property as between husband and wife has been adverted to and decided in many cases, especially, of course, since the passing of the Married Women's Property Act, 1882: see *Ramsay* v. *Margrett*[9] and *Youngs* v. *Youngs.*[10]

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[2] [1896] 2 Q.B. 44.
[3] [1896] 2 Q.B. 44, 47.
[4] [1907] 2 K.B. 437.
[5] Ibid. 444.
[6] [1896] 2 Q.B. 44.
[7] (1790) 1 H.Bl. 357.
[8] Ibid. 360.

The possession here is ambiguous in one sense, because the husband and wife were both living in the house. It may be, of course, that these notes were put there between the death of the husband and that of the wife; but that does not seem at all likely; and assuming that they were placed there during the joint lives, then one may say that the possession of them as goods in the house is entirely ambiguous. Nobody can say, as between the husband and wife, to which of them the lawful possession must be attributed; and it is suggested and submitted that the principle which I have indicated, which depends, I think, largely upon the authority of the *South Staffordshire* case,[11] strange though it may appear and slight as may be the straw which has to be grasped by the swimmer in this sea of ambiguity, must determine the issue in this matter, as there is nothing better to depend on.

I adopt this principle with reluctance, because it seems to me to be a somewhat inhuman way of approaching the problem; but I cannot bring myself to believe that there is any solution which I could accept as so likely, probable, or convincing that it could override what has been laid down to be a principle of law to resort to if there is nothing else to guide one. On the whole, it seems to me that I must follow that case, and hold that the money belonged to the wife. As I have said, we know nothing of the facts; but, in any case, the notes were in the flat when the wife died; and if they were placed there in the husband's lifetime then they were placed by one of two spouses on and in property which belonged to one of them; and I think that I must decide that these notes and coin were the property not of the husband but of the wife.

I have said that I regard this as rather an inhuman approach to the matter, and if I could have decided the case on a ground a little (if I may say so) more picturesque than one which depends on the ownership of the legal estate in the premises, I should have been very glad to do so. It was suggested that useful guidance was afforded by a recent decision of my own, *Jones* v. *Maynard*,[12] approved in the Court of Appeal in *Rimmer* v. *Rimmer*,[13] a case which was also helpful.

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[9] [1894] 2 Q.B. 18.

[10] [1940] 1 K.B. 760.

[11] [1896] 2 Q.B. 44.

[12] [1951] Ch. 572.

[13] [1953] 1 Q.B. 63.

In the former case I came to the conclusion (which I cite without hesitation because my decision was later approved) that where a husband and wife have what is called a "joint purse," and the purposes for which the joint purse was formed come to an end, the proper way for a court of equity to deal with the money is not to investigate the precise sources out of which the fund was built up, but to assume that the intention was an equal division of what was left. I am bound to say that the analogy of that case does not seem to be applicable to the present facts, because I am rather disposed to think, if speculation be possible, that the most likely history of this deposit was that the husband and wife put the notes aside with a view to providing for the survivor of them. I am not suggesting that there was any intention to conceal assets from the Revenue authorities, for it may well be that during the perilous times of the war it was thought advisable to have a large sum of cash at hand in case the husband, in particular, should meet with sudden death, leaving the wife to maintain herself; and, of course, the same point would arise if the survivor were the husband.

I should rather suppose that, in such a case, the presumption would be not for a division but for an equality of ownership, in this sense: that the nest-egg (if it may be so described) was intended to remain intact for the benefit of the survivor after the death of one of the spouses; and applying *Jones* v. *Maynard*,[14] so far as it ought to be applied, I should be disposed to think that if the principle of equality applied, it only applied to this extent—that, while the ownership of the fund might be presumed to be one of equality between the spouses, their interest in it was probably that of a severable joint tenancy, so that if they wanted to divide up the fund in their joint lifetimes they could have done so, but if they did not desire so to divide it then the fund would remain for the benefit of the survivor. As I have said, I do not like to suggest that there was any intention here of concealment of assets from the notice of the Revenue authorities; but I should have drawn the deduction that this fund was intended to remain for the benefit of the survivor of the two, without any right of participation in it after death by that one of them who should happen first to die.

If that is the view—and I must say that I only put it as an alternative to the main point on which I have decided the case, unsatisfactory though that point is—the result would be exactly the same. The wife having survived, if the arrangement was as I have described it, she would be entitled to the fund as survivor. However, I base my decision primarily on the point which I mentioned first; but in case I am held to be wrong in a higher court, I should desire to add as an alternative reason for deciding in favour of the estate of the wife rather than that of the husband, that if it were possible now to draw a deduction from one's knowledge of human nature and one's fancy in drawing pictures from very inadequate material, I should hold that this was a fund intended to be divisible, if desired, during the joint lives of the spouses, but intended otherwise to enure for the benefit of the survivor. On that view, also, the wife's estate would be entitled to my judgment.

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[14] [1951] Ch. 572.

In answer to the question raised by the summons, which was in these terms, whether, having regard to the master's certificate, the executors may deal with the notes and coin on the footing either that the whole was the property of the testator or that the whole was the property of the testatrix, or that the notes and coin belonged to both, I will declare that the whole was the property of the testatrix; and I will so declare not merely having regard to the certificate of the master, but to the evidence filed on this question which is mentioned in that certificate.

Declaration accordingly.

Solicitors: *Haslewood, Hare & Co., for Bosley & Co., Brighton; Teff & Teff; T. V. Edwards & Co.; Gilbert Samuel & Co.*

F. R. D.

C. A.

1952
Nov. 18, 19, 20;
Dec. 15.

Somervell, Jenkins and Romer L.JJ.

In re GOETZE. NATIONAL PROVINCIAL BANK LD. *v.* MOND.

[1952 G. 701.]

Will—Legacies and annuities—Bequest free of all death duties—Part of estate Canadian shares—Dominion of Canada succession duty—Liability of legatees and annuitants—Double taxation relief—Credit in reduction of English estate duty—For benefit of persons by whom the succession duty paid—Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (*S.R. & O.* 1946, *No.* 1884), *arts.* 1, 4 (1), 5 (1).

By her will dated March 2, 1949, a testatrix residing in England declared that "all legacies and annuities bequeathed by this my "will . . . are to be paid free of legacy duty and all other "death duties." She then bequeathed a very large number of pecuniary legacies and annuities (including one to Mrs. Mond, who was appointed to represent all the legatees and annuitants), and she then devised and bequeathed all her residuary real and personal estate upon trust for sale and conversion and directed that out of the proceeds and any ready money the trustees of her will should pay her funeral and testamentary expenses and debts and pay or provide for all legacies and annuities " and the duty on all " such legacies and annuities " and hold the residue in trust for C.

The testatrix's net estate was valued at £431,501 of which about half was property in England and the remainder consisted of 26,150 preferred shares and 10,976 common shares of the International Nickel Co. of Canada. English estate duty was paid on the whole estate and Dominion of Canada succession duty was payable in respect of the shares of the International Nickel Co., amounting to £82,034.

Under article 5 of the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, there was allowed by the English estate duty office in respect of Canadian securities a credit of the same amount, £82,034, against the English estate duty reducing it to £198,441.

Held, (1) that the English estate duty paid in respect of the Canadian shares must be borne by the residuary estate; and (2) (by Jenkins and Romer L.JJ.) that the direction to pay the legacies and annuities free of death duties did not apply to foreign duties so that the legatees and annuitants must pay so much of the Dominion of Canada succession duty as properly fell to be borne by them: *In re Cunliffe-Owen* [1951] Ch. 964; [1951] 1 T.L.R. 1073; 2 T.L.R. 231; [1951] 2 All E.R. 220, and *In re Norbury* [1939] Ch. 528; 55 T.L.R. 589; [1939] 2 All E.R. 625, applied; but (3) (by the court) that the credit of £82,034 against the English estate duty under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, enured rateably for the benefit of the persons by whom the Dominion of Canada succession duty had fallen to be borne, with the ultimate result that the legatees and annuitants were relieved of all their liability for the Canadian duty: *In re Cunliffe-Owen* [1951] Ch. 964, 975, applied.

Decision of Upjohn J. reversed.

APPEAL from Upjohn J.

By the will dated March 2, 1949, of Constance Goetze, which, with a codicil not material for the purposes of this case, was proved on April 4, 1951, she appointed the National Provincial Bank Ld., Hyman Stone, and Countess Cippico to be her executors and trustees.

By clause 2 she declared " that all legacies and annuities " bequeathed by this my will or any codicil hereto are to be paid " free of legacy duty and all other death duties."

By clauses 8 to 47 inclusive the testatrix bequeathed forty-three pecuniary legacies and annuities, including a legacy of £1,000 to the defendant Elizabeth Mond, to persons who, with two exceptions, survived the testatrix.

By clause 50 the testatrix devised and bequeathed all her residuary real and personal estate to the trustees upon the usual trusts for sale and conversion and then directed as follows: "And "my trustees shall out of the moneys to arise from the sale, "calling-in and conversion of or forming part of my residuary "estate and out of my ready money pay my funeral and testa-"mentary expenses (including all payments to be deemed "testamentary expenses under the provisions of this my will) "and debts and shall pay or provide for all legacies and annuities "bequeathed by this my will or any codicil thereto and the duty "on all such legacies and annuities and subject as aforesaid my "trustees shall hold the residue of my estate in trust for" the Countess Cippico.

The testatrix's net estate was valued for the purpose of estate duty at £431,501, on which English estate duty at the rate of 65 per cent. was paid, amounting to £280,475. About half her estate was in England and mainly in stocks and shares, but she also held 26,150 preferred shares and 10,976 common shares of International Nickel Co. of Canada Ld. English estate duty had been paid on these but they were subject to Dominion of Canada succession duty, the amount actually paid to the Canadian authorities in respect of the duty being £82,034. Under article 5 of the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, there was allowed by the English estate duty office in respect of the Canadian securities a credit of the same amount against the English estate duty, reducing it to £198,441.

By an affidavit of Mr. J. M. Isaacs, a barrister and solicitor of the Supreme Court of Canada, it was stated that Dominion of Canada succession duty was assessed on all successions on death to Canadian property, and in the case of a testator dying domiciled in England the rates of duty were assessed solely by reference to his property situated or deemed to be situated in the Dominion. It was further stated that Dominion succession duty was assessed at rates varying with the aggregate net value of the Canadian property passing on the testator's death, the relationship of the successor to the testator and the aggregate amount of all successions to Canadian property accruing to the same successor on the same death, with an exception in the case of successions worth less than $1,000. Such duty was payable by the successor and no part of the duty was ultimately payable out of the residuary estate. In the case of successions to the residuary estate or any share or interest therein the succession duty and interest (if any) were payable by the individual successors as in the case of a pecuniary legacy.

In these circumstances the plaintiffs, who were two of the trustees of the will, took out an originating summons to which Mrs. Mond as a pecuniary legatee and the Countess as residuary legatee as well as the third trustee of the will were parties, asking (1) whether and to what extent the pecuniary legacies and annuities ought, as between such legacies and annuities and the residuary estate, to bear (a) estate duty imposed in Great Britain payable in respect of movable property of the testatrix situate abroad at the testatrix's death, (b) interest on such estate duty, (c) Dominion of Canada succession duty; (2) whether the credit of £82,034 under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, enured for the benefit of the residuary estate of the testatrix, or how otherwise the same ought to be disposed of.

Upjohn J. declared that, as regards the pecuniary legacies and annuities, the estate duty imposed in Great Britain and payable in respect of movable property abroad and the interest thereon should be borne by the residuary estate, but that the Dominion of Canada succession duty ought to be borne by the legatees and annuitants. And he also declared that the credit of £82,034 under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, enured for the benefit of the testatrix's residuary estate. He also appointed Mrs. Mond to represent all the pecuniary legatees and annuitants under the will.

Mrs. Mond appealed, claiming (1) that the Dominion of Canada succession duty payable in respect of the legacies and annuities ought to be paid out of the residuary estate; and (2) alternatively, in case the Dominion of Canada succession duty ought to be borne by the legatees and annuitants, that the order should be reversed in so far as it declared that the credit of £82,034 enured for the benefit of the residuary estate, and that it might be declared that such credit enured rateably for the benefit of the persons by whom the duty fell to be borne.

J. A. Wolfe for the appellant. In the memorandum which the testatrix had made the total of the estate duty is treated as payable out of residue. It is submitted that the memorandum is admissible in evidence as part of the attendant circumstances. The testatrix must be assumed to have known that there would be a remission in respect of the Canadian duty. The question is whether the legacies and annuities have to bear the Canadian duty or whether it is payable out of residue.

It is submitted first that there is no general principle that in a gift free of "death duties" the death duties in question do not include foreign death duties. No such rule was considered to exist before Wynn-Parry J.'s decision in *In re Cunliffe-Owen.*[1] In *In re Norbury*[2] Bennett J. was not dealing with a foreign tax payable in respect of the foreign assets of the deceased but with a personal tax payable by the beneficiary on succession. The judge went farther than was necessary to determine the case before him. That case is distinguishable from this. It is no authority for the general proposition that a gift free of death duties is not a gift free of foreign death duties. *In re Quirk*[3] was also a different case to this. That was the case of a devise of immovable property in France. *In re Frazer*[4] is prima facie against the appellant. It, however, relates to income tax. The Canadian duty is a hybrid between legacy duty and estate duty. It is submitted that a gift free from duty means what it says and the beneficiary takes free from all death duties wherever payable by reason of the death of the deceased but the beneficiary does not take free from any tax exigible by reason of his own domicile.

It is submitted that Wynn-Parry J. in *In re Cunliffe-Owen*[5] and Upjohn J. in this case were wrong in holding that a gift free of duty is prima facie confined to freedom from English death duties. That view is based on a misunderstanding of the scope of the earlier authorities.

Secondly, it is submitted that, if there is any rule that prima facie a gift free of duty is only a gift free from English estate duty, that rule must give way to the context when considered in the light of the attendant circumstances. In this case a large part of the fortune of the testatrix was invested in the Canadian shares. The evidence shows that she was well aware of this and took a keen interest in her financial affairs. It is submitted that the memorandum is admissible evidence to show that she thought that the estate duty would wholly fall on residue and to resolve the latent ambiguity in the will.

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[1] [1951] Ch. 964; [1951] 1 T.L.R. 1073; 2 T.L.R. 231; [1951] 2 All E.R. 220.

[2] [1939] Ch. 528; 55 T.L.R. 589; [1939] 2 All E.R. 625.

[3] [1941] Ch. 46; 56 T.L.R. 983.

[4] [1941] Ch. 326; 57 T.L.R. 481; [1941] 2 All E.R. 155.

[5] [1951] Ch. 964.

Thirdly, it is submitted that on general equitable principles if someone makes a payment which enures for the benefit of the estate then he is entitled to be repaid what he has paid. Here the Canadian beneficiaries have made payments in respect of the Canadian duties and they are entitled to be recouped. *In re Joel* [6] turned on the language of the Acts relating to the payment of duty in respect of the estates of persons killed in war and no one there had spent money for the benefit of the estate.

If the beneficiaries who have paid the Canadian duty are not entitled to be repaid what they have spent, the effect of the bequests free of duty is not to free the legacies from duty but the residue. It is submitted that the benefit of the remission of English estate duty in respect of the Canadian duty under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, should go to the persons liable for the duty. If that is wrong it is submitted that the benefit of the remission should be shared between the beneficiaries in proportion to their interests in the estate. The payments have been unequal having regard to their relationship. It is submitted that the better way is to treat the relief in respect of the Canadian payment as being in effect a payment on account of the English estate duty.

Lionel Edwards Q.C. for the respondent. It is submitted that the legatees have not been exonerated by this will from the Canadian duty. The only rule to be applied is to give effect to the intention of the testatrix as expressed in her will. It is not disputed that the observations of Bennett J. in *In re Norbury* [7] went further than the facts of the case before him required. It is submitted that the authorities establish that to make a gift free from foreign duties and to impose a corresponding burden on residue the will must contain a sufficient expression of intention to that effect, and words of exoneration which are consistent with an intention to refer to English duties only are not in themselves a sufficient expression of intention to exonerate from foreign duties. Prima facie the court should lean to limiting a gift " free " of duties " to freedom from English death duties. If the words are not so limited, the result may be to impose a heavy burden on the estate. If, for example, the legatee is domiciled in a country where a heavy duty is payable on a succession, *In re Scott* [8] shows that legacy duty will be construed as referring to

[6] [1943] Ch. 311; 59 T.L.R. 355; [1943] 2 All E.R. 263.

[7] [1939] Ch. 528; 55 T.L.R. 589; [1939] 2 All E.R. 625.

[8] [1915] 1 Ch. 592; 31 T.L.R. 227.

English legacy duty. It is submitted that the language of this will is not apt to cover foreign duty. The will as a whole suggests that the testatrix only had in mind English taxation. The form of the will could only have weight on the footing that the testatrix knew that Canadian duty would be payable, and there is no evidence to show this. It has been suggested by the court that the words of exoneration from duty as regards the legacies and annuities might cover foreign duty. That halfway house implies imputing this intention to the testatrix and it is much more likely that the testatrix had in view only English duties. It is true that the testatrix knew of the holding of International Nickel Co. of Canada shares, but it must be remembered that these shares are dealt with on the English market and there is no ground for assuming that the testatrix knew whether they were on the English or Canadian register; and the court ought not then to assume that the liability for Canadian duty was present to the testatrix's mind. It follows then that the credit under article 5 of the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, enures for the benefit of the residuary legatee as the person on whom the burden of English estate duty has fallen: see *In re Duke of Sutherland*.[9]

F. B. Marsh for the plaintiffs.

J. A. Wolfe for the appellant in reply.

Cur. adv. vult.

December 15. SOMERVELL L.J. I will ask Jenkins L.J. to read his own judgment and then the judgment of Romer L.J.

JENKINS L.J. This is an appeal from an order made by Upjohn J. on May 14, 1952, concerning the incidence as between the pecuniary legatees and annuitants under the will of the testatrix, Constance Goetze (represented by the appellant Elizabeth Mond), and the residuary estate of the testatrix (to which the respondent, Countess Cippico, is solely entitled) of the United Kingdom estate duty and of the Canadian succession duty attributable to the personal estate of the testatrix situated in the Dominion of Canada. The judge declared that the United Kingdom estate duty so attributable and the interest thereon ought to be borne by the residuary estate of the testatrix, and that declaration is not appealed from by the residuary legatee. But he also declared that the Canadian succession duty so attributable ought to be borne by the legatees and annuitants concerned, and that the credit of the amount of such Canadian

[9] [1922] 2 Ch. 782.

succession duty allowed against the United Kingdom estate duty under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, enured for the benefit of the residuary estate of the testatrix; and from this part of the judge's order the appellant, as representative of all the pecuniary legatees and annuitants, now appeals to this court.

The testatrix died domiciled in England on February 12, 1951. [His Lordship then referred to the material provisions in her will.] The net value of the testatrix's estate, for the purposes of United Kingdom estate duty, was £431,501 4s. 3d., and, in addition to other assets, all of which were situated in England, it comprised 26,150 preferred and 10,976 common shares in the International Nickel Company of Canada Ld., valued for duty purposes at £230,243 15s. 1d., which were situated in Canada. As the testatrix was domiciled in England these shares, notwithstanding their Canadian situation, attracted United Kingdom estate duty on her death, and accordingly fell to be included in the above-mentioned total net estate of £431,501 4s. 3d. upon which United Kingdom estate duty at the appropriate rate (viz., 65 per cent.) amounting to £280,475 13s. 2d. was assessed. But notwithstanding the testatrix's English domicile the last-mentioned shares (which I will call "the Canadian estate") also attracted, by reason of their Canadian situation, the succession duty exigible under the law of Canada upon the beneficial interests in the Canadian estate created by her will. In these circumstances, the Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (S.R. & O., 1946, No. 1884) (which I will call the "Double Taxation Order") applied to the case. The Double Taxation Order is an Order in Council made under section 54 of the Finance (No. 2) Act, 1945.[1]

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[1] Finance (No. 2) Act, 1945, s. 54: "(1) If His Majesty by Order in "Council declares that arrangements "specified in the Order have been "made with the government of any "territory outside the United Kingdom "with a view to affording relief from "double taxation in relation to estate "duty payable under the laws of the "United Kingdom and any duty of a "similar character imposed under the "laws of that territory, and that it is "expedient that those arrangements "should have effect, the arrangements "shall, notwithstanding anything in "any enactment, have effect so far as "they provide for relief from estate "duty, or for determining the place "where any property is to be treated "as being situated for the purposes "of estate duty."

The Double Taxation Relief (Estate Duty) (Canada) Order, 1946, declares: "2. (*a*) that the arrangements "specified in the Agreement set out "in the Schedule to this Order have "been made with the Government of "Canada with a view to affording "relief from double taxation in relation to estate duty payable under "the laws of the United Kingdom and "duty of a similar character imposed

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From the affidavit of a Canadian lawyer filed in the present proceedings it appears: (1) that Canadian succession duty is assessed and chargeable on all successions on death to Canadian property; (2) that for this purpose (so far as now material) "succession" means every disposition of property whereby any person becomes entitled to any property or the income thereof upon the death of any person; (3) that where the deceased was at the time of his death domiciled outside Canada the duty is exigible upon or in respect of the succession to all property situated in Canada; (4) that the duty in respect of any succession under the will of a testator is assessed at rates varying with the aggregate net value of the Canadian property passing on the death, and the relationship of the successor to the testator, and that there are certain exemptions, one of which frees successions less than $1,000 from the duty; (5) that the successor is liable for the duty assessed in respect of any succession under the will of a testator but that such duty is nevertheless payable by and recoverable from the executors to the extent of the property administered by

"under the laws of Canada; and (*b*) "that it is expedient that those "arrangements should have effect."

The Order sets out in the Schedule thereto the agreement between the two governments, which includes the following provisions: "Article 1 (1): "The duties which are the subject of "the present agreement are:—(*a*) In "the United Kingdom, the estate duty "imposed in Great Britain, and (*b*) In "Canada, the succession duty imposed "by Canada. (2) The present agreement shall also apply to any other "duties of a substantially similar "character imposed by either contracting government subsequent to "the date of signature of the present "agreement. . . ."

Article 4: "(1) In determining the "amount on which duty is to be computed, permitted deductions shall be "allowed in accordance with the law "in force in the territory in which "the duty is imposed. (2) Where "duty is imposed by one contracting "government on the death of a person "who was not domiciled at the time "of his death in any part of the territory of that contracting government "but was domiciled in some part of "the territory of the other contracting government, no account shall be "taken, in determining the amount "or rate of the duty so imposed, of "property situated outside the former "territory."

Article 5: "(1) Where one contracting government imposes duty "by reason of a deceased person being "domiciled in some part of its territory at the time of his death, that "contracting government shall allow "against so much of its duty (as "otherwise computed) as is attributable to property situated in the "territory of the other contracting "government a credit (not exceeding "the amount of the duty so attributable) equal to so much of the duty "imposed in the territory of the other "contracting government as is attributable to such property. . . . (4) "For the purposes of this Article, the "amount of the duty of a contracting "government attributable to any property shall be ascertained after "taking into account any credit, "allowance or relief, or any remission "or reduction of duty, otherwise than "in respect of duty payable in the "territory of the other contracting "government."

them, with a right for executors who are required to pay the duty to deduct it in paying over the amount of the succession or to recover it from the successor personally in the event of the succession being satisfied otherwise than in money.

The notice of assessment which is in evidence shows how the Canadian succession duty was assessed in the present case. To put it shortly, the net Canadian estate was ascertained by deducting from the gross value of the Canadian estate a proportion of the total debts of the testatrix corresponding to the proportion borne by the gross value of the Canadian estate to the gross value of the total estate. The pecuniary legatees and annuitants and the residuary legatee were respectively treated as entitled to beneficial interests (or " successions ") in the net Canadian estate bearing the same proportions to their respective interests in the total net estate as the proportion borne by the net Canadian estate to the total net estate; and (apart from exemptions) each proportionate beneficial interest so ascertained was assessed, as a " succession," to duty at the appropriate rate, consisting of the basic rate of 11.7 per cent. appropriate to the aggregate net value of the Canadian estate plus an additional percentage varying with the relationship of the particular successor to the testatrix. The total amount of the Canadian succession duty thus assessed was $245,087.16 or £82,034 10s. 9d. This Canadian duty was duly paid by the executors, who under article 5 of the Double Taxation Order were accordingly allowed a credit of £82,034 10s. 9d. against the United Kingdom estate duty attributable to the Canadian estate, leaving a balance payable, and in fact paid, of £198,441 2s. 5d. in respect of the last-mentioned duty, out of the total assessment of £280,475 13s. 2d.

The questions which, in the circumstances I have stated, arise for determination in the present appeal are, in effect: (1) whether upon the true construction of the testatrix's will the Canadian succession duty attributable to the pecuniary legacies and annuities ought (apart from the provisions of the Double Taxation Order) to be borne by the respective legatees and annuitants or by the residuary estate; and (2) if that question should be answered in the former sense, whether the provisions of the Double Taxation Order have the effect of throwing the liability for such Canadian succession duty on to the residuary estate in exoneration of the pecuniary legacies and annuities. Mr. Wolfe, for the appellant, conceded that the Canadian succession duty was not a testamentary expense, and, accordingly,

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that unless he could show the pecuniary legacies and annuities to have been exonerated from this duty by some express provision in the will, they must (apart from the effect of the Double Taxation Order) bear their due proportions of it ascertained in accordance with the Canadian assessment on the footing that they were payable rateably out of the English and Canadian estates. He argued, however, that the will did on its true construction, when read in the light of the attendant circumstances, expressly exonerate the pecuniary legacies and annuities from Canadian succession duty, as well as United Kingdom estate duty so far as the latter was not automatically payable out of residue as a testamentary expense.

The passages in the will on which he relied were the direction in clause 2 that all legacies and annuities were to be paid " free " of legacy duty and all other death duties," and the direction in clause 50 to " pay or provide for all legacies and annuities " . . . and the duty on all such legacies and annuities." He contended that these words were in themselves wide enough to include Canadian succession duty, and should be construed as including that duty, especially when read in the light of the attendant circumstances. Now the words relied on by Mr. Wolfe are no more than ordinary directions as to duty such as might be found in any English will, and the only duty specifically described is (or was) an English one, namely, legacy duty. The attendant circumstances on which Mr. Wolfe relies come to no more than this, that the testatrix held more than half her estate in the form of shares situated in Canada, that she was a good business woman who took an interest in her affairs, and that she had caused to be prepared annually a statement showing the value of her residuary estate as it would be, having regard to the terms of her will, and that the latest of such statements, dated May 10, 1950 (which is one of the exhibits in the case) allows for the payment out of residue of United Kingdom estate duty at 65 per cent., without any reference to Canadian succession duty as payable out of the pecuniary legacies and annuities and producing a credit of like amount for the benefit of residue against the full amount of United Kingdom estate duty it would otherwise bear.

The fact that the testatrix held more than half her estate in the form of shares situated in Canada is no doubt a circumstance proper to be taken into consideration in construing the directions as to duty contained in her will, but with this qualification I cannot regard the so-called attendant circumstances to which I have referred as throwing any light on the meaning of the relevant passages in the will, and I think the use sought to be made of the statement of May 10, 1950 (which was relied on by Mr. Edwards, for the respondent, as pointing, if anything, the other way) came perilously near to its introduction as direct evidence of the testatrix's intention, which would plainly be inadmissible. The trial judge held that the directions as to duty contained in the testatrix's will did not upon their true construction extend to Canadian succession duty, and in so holding he followed the decision of Wynn-Parry J. in *In re Cunliffe-Owen.*[2] In that case Wynn-Parry J. reviewed the authorities and held them to establish a rule of construction that prima facie directions such as those in the present will by which duties are thrown on the residuary estate in exoneration of legacies are to be construed as referring only to United Kingdom death duties, with the qualification that directions of this nature "may in appro-" priate circumstances, be given a wide scope rather than a "narrower scope by reason of the attendant circumstances, if "they are sufficiently compelling, and even in the absence of "express words in the will referring to duties imposed by the "law of foreign countries." I need not repeat Wynn-Parry J.'s review of the authorities. They leave the question open in this court, but in my view the rule, and the qualification upon it, deduced from them by Wynn-Parry J. are right in principle, and the scope of the directions as to duty contained in the present will should be judged accordingly. So judged, those directions must, in accordance with the rule, be held confined to United Kingdom duties, unless the attendant circumstances are sufficiently compelling to warrant the extension of their primary meaning so as to include Canadian succession duty. As appears from what I have said above, the attendant circumstances relied on in my view really provide no assistance beyond the bare fact that more than half the testatrix's estate consisted of assets situated in Canada in the form of her holdings of shares in the International Nickel Company of Canada, Ld. Is that fact in itself enough to displace the rule? In my view it is not. The directions in question are well satisfied if construed in accordance with the rule as referring only to United Kingdom duties, and therefore the case is not one in which directions as to duty in the ordinary form must be taken to refer to foreign duty because no

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[2] [1951] Ch. 964; [1951] 1 T.L.R. 1073; [1951] 2 All E.R. 220.

United Kingdom duty is payable. The mere fact that the testatrix had important assets in Canada as well as in this country, falls far short of raising a necessary implication that she used the expression "death duties" as meaning Canadian as well as United Kingdom duties. She or her advisers may well have omitted to take Canadian duties into account at all, or may have thought that such duties would automatically fall on residue without any express direction to that effect, or may not have appreciated that the Canadian shares were technically situated in Canada for duty purposes and would, therefore, attract Canadian duty notwithstanding the testator's English domicile. One might add that the question commonly arises by reason of the fact that a testator or testatrix dies possessed of assets situated abroad, and that it would be curious if the circumstances giving rise to the question in itself sufficed to displace the general rule. Accordingly, I am not prepared to hold that the directions as to duty in the present case extend to the Canadian succession duty.

It follows that, apart from the effect of the Double Taxation Order, the pecuniary legatees and annuitants must, on the basis of Mr. Wolfe's concession, bear their due proportion of the Canadian succession duty. But in considering the effect of the Double Taxation Order it must be borne in mind that (to relate the relevant directions to the particular United Kingdom duty actually in question) the testatrix did undoubtedly give the pecuniary legacies and annuities free of United Kingdom estate duty and direct that the United Kingdom estate duty on such legacies and annuities (so far as not automatically payable out of residue as a testamentary expense) should be paid or provided for out of her residuary estate. This means that residue had to bear all payments necessary to make the pecuniary legacies and annuities free of United Kingdom estate duty before the residuary legatee could take anything. It also means, so far as the Canadian estate was concerned, that the Canadian estate had to provide its due proportion of the pecuniary legacies and annuities and the United Kingdom estate duty thereon before any part of that estate could go to the residuary legatee.

The effect of article 5 of the Double Taxation Order appears to have been that the United Kingdom estate duty was to be assessed in full on the Canadian estate without regard to Canadian succession duty; that the Canadian succession duty was to be similarly assessed thereon without regard to the United Kingdom estate duty, and that the Canadian succession duty was then to be allowed as a credit of like amount against the

United Kingdom estate duty, or, in other words, as a payment operating to discharge a like amount of United Kingdom estate duty. It seems to me, therefore, that if the Canadian succession duty attributable to the Canadian proportion of the pecuniary legacies and annuities was thrown on those benefits they would not have been paid free of United Kingdom estate duty. They would have been paid free of United Kingdom estate duty save in so far as that duty was satisfied by the payment of Canadian succession duty out of the pecuniary legacies and annuities. The amount paid in respect of Canadian succession duty was, to my mind, none the less for the present purpose a payment of United Kingdom estate duty because under the terms of the Order it served the double purpose of discharging both the Canadian succession duty and also a like amount of United Kingdom estate duty.

The matter can, I think, be put in another way which leads to substantially the same conclusion. By virtue of the directions in the will the liability for the whole of the United Kingdom estate duty attributable to the Canadian estate was thrown on the residue of that estate in exoneration of the proportion so attributable to the pecuniary legacies and annuities. The directions in the will did not, however, extend to Canadian succession duty, and therefore, on the basis of Mr. Wolfe's concession, so much of that duty as was attributable to the pecuniary legacies and annuities had to be paid out of those legacies and annuities. But by virtue of the Double Taxation Order the effect of such payment was to discharge at the expense of the pecuniary legatees and annuitants a like amount of the United Kingdom estate duty which, according to the terms of the will, the residuary legatee was to bear. Therefore, the credit against United Kingdom estate duty secured under article 5 of the Double Taxation Order by the payment of Canadian succession duty out of the pecuniary legacies and annuities should enure for the benefit of the pecuniary legatees and annuitants in order to give full effect to the direction in the will whereunder the whole of the United Kingdom estate duty on the Canadian estate fell to be borne by the residuary legatee. It was not, I think, disputed that if there had been no special directions at all in the will concerning death duties, so that each of the pecuniary legacies and annuities had to bear its due proportion of the United Kingdom estate duty attributable to the Canadian estate, the credit against such United Kingdom estate duty secured under article 5 of the Double Taxation Order by payment out of each pecuniary legacy or annuity of its due proportion of the Canadian succession duty would have enured for the benefit of the pecuniary legatee or annuitant concerned (which appears to have been the effect of the decision in the second judgment in *In re Cunliffe-Owen*).[3] I do not see why the result should be any different because the pecuniary legacies and annuities were given free of United Kingdom estate duty, for the effect of this quoad the Canadian estate was to give to each pecuniary legatee or annuitant an additional benefit out of the Canadian estate in the shape of the proportion of the United Kingdom estate duty on the Canadian estate which his or her legacy or annuity would otherwise have had to bear; and inasmuch as payment of the Canadian succession duty on such legacy or annuity operated to discharge a like amount of United Kingdom estate duty, payment of the former duty out of such legacy or annuity would have the effect of depriving the legatee or annuitant of a corresponding part of the additional benefit to which he or she was entitled under the terms of the will, if such payment was not counterbalanced by giving to him or her the benefit of the credit against the United Kingdom estate duty which it had secured by virtue of the provisions of the Double Taxation Order. Perhaps the simplest way of putting the point—I trust it is not an over-simplification—is to describe the effect of the Double Taxation Order as being in substance to preserve the liability of the Canadian estate to assessment to United Kingdom estate duty at the full appropriate rate of 65 per cent. but to make the Canadian succession duty payable out of the amount of the United Kingdom estate duty as so assessed.

I conclude, therefore, that the whole of the United Kingdom estate duty at the appropriate rate of 65 per cent. on the Canadian estate should be borne by the residuary legatee and that she is not entitled to throw upon the pecuniary legatees and annuitants the proportion of it which was satisfied by the payment of, or in other words, was applied in payment of, the Canadian succession duty on the pecuniary legacies and annuities.

The argument for the residuary legatee proceeds on the footing that the effect of the Double Taxation Order is to make the Canadian estate liable to (i) United Kingdom estate duty reduced by the amount of the Canadian succession duty, and (ii) Canadian succession duty; that by the terms of the will the pecuniary legatees and annuitants are relieved of the reduced United Kingdom estate duty but not of the Canadian succession duty; and accordingly that while the residuary legatee must bear the former, the pecuniary legatees and annuitants must bear their due proportions of the latter. I reject this argument as involving a departure from the actual terms of the Double Taxation Order, which does not reduce the amount of the United Kingdom estate duty, but allows the payment of Canadian succession duty as a credit against, or in other words treats it as discharging a like amount of, the full United Kingdom estate duty.

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[3] [1951] Ch. 964, 975.

For the reasons I have endeavoured to state I would allow the appeal and vary the declarations made by the judge as regards Canadian succession duty so as to give effect to the conclusion above expressed. Subject to any further arguments counsel may wish to advance as to the precise form of the order, I think the appropriate variations might be to insert the words "subject as hereinafter appears" in the first declaration immediately before the words "the Dominion of Canada succession "duty" and to add at the end of the second declaration the words "and the pecuniary legatees and annuitants under her "said will rateably in proportion to the amounts of Dominion of "Canada succession duty assessed on the respective interests of "the residuary legatee and of such pecuniary legatees and "annuitants respectively in the property of the testatrix "situated in the Dominion of Canada."

I feel I should add that in the course of the argument a suggestion which Mr. Wolfe, for the appellant, felt unable to support was made to the effect that irrespective of any special direction in the will and independently of the provisions of the Double Taxation Order the Canadian succession duty might perhaps properly be regarded simply as part of the cost of getting in the Canadian estate, and as such falling on residue generally. This is not a case of a specific gift of property situated in a foreign country and attracting duty by virtue of the laws of that country, or a gift to a legatee domiciled or resident abroad which attracts duty in the hands of the legatee under the law of his or her domicile or place of residence. It is simply a case in which property situated in Canada has passed under a general residuary devise and bequest in the English will of a testatrix domiciled and resident here, and in which this country is the appropriate forum of administration. The residue, including the Canadian estate, is given upon the usual

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trusts for sale and conversion and payment of funeral and testamentary expenses and debts and pecuniary legacies and annuities and the United Kingdom duties thereon, and subject to these payments in trust for the respondent residuary legatee. To get in the Canadian estate and make it available for application as above, the executors had to pay the estate duty on the Canadian property. It is true that under the law of Canada the duty in question was assessed on the beneficial interests, and according to that law would fall ultimately to be borne by the beneficiaries concerned, the extent of their beneficial interests in the Canadian estate being ascertained by treating them as provided rateably out of the net Canadian and English estates, and the rates of duty varying with the relationship of the beneficiaries to the testatrix. But it does not necessarily follow that these features of the Canadian fiscal law, involving as they do a wholly artificial apportionment of debts and benefits as between the Canadian and English estates, should be imported into an English administration, and the alternative course of treating the amount of the Canadian duty simply as part of the cost of getting in the Canadian estate, without regard to the peculiarities of the local law as to mode of assessment and incidence, would certainly have the merit of simplicity. The possible view to which I am now calling attention is supported by *Peter* v. *Stirling*[4] and *In re Maurice*,[5] and particularly the latter case, where an Australian duty assessed by reference to the ages of the beneficiaries was held payable out of the estate as a whole and not out of the respective interests of the beneficiaries in accordance with the amounts assessed upon them in Australia. These two cases were distinguished by Swinfen Eady J. in *In re Brewster*,[6] which was a case of a specific devise, on trusts separate from those of the residuary estate, of land in Melbourne, Victoria, Australia, in which it was held that the local death duties and other costs of realizing the Melbourne property fell on that property and not on residue. *Peter* v. *Stirling*[7] was also distinguished by Warrington J. in *In re Scott*,[8] where it was held that the French mutation duty on chattels situated in France should be borne by the specific legatees thereof and not by residue; and Warrington J.'s decision was upheld in the Court of Appeal.[9]

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[4] (1878) 10 Ch.D. 279.

[5] (1896) 75 L.T. 415; 18 T.L.R. 36.

[6] [1908] 2 Ch. 365.

[7] 10 Ch.D. 279.

[8] [1914] 1 Ch. 847.

[9] [1915] 1 Ch. 592; 31 T.L.R. 227.

But there is nothing in the judgment of Swinfen Eady J. in *In re Brewster* [10] or of Warrington J.[11] or the Court of Appeal in *In re Scott* [12] to suggest that *Peter* v. *Stirling* [13] and *In re Maurice* [14] were wrongly decided. On the contrary, Warrington J.'s explanation in *In re Scott* [15] of the ratio decidendi in *Peter* v. *Stirling* [16] seems to me to bring it fairly close to the present case, and his judgment was affirmed without qualification in the Court of Appeal. As the point has not been argued in the present case, and if made good would lead to the same conclusion as I have reached on other grounds, I express no opinion about it one way or the other, but merely refer to it lest this judgment, which is framed in accordance with the arguments presented, should be regarded as implicitly concluding it if raised in any future case.

In conclusion, I would associate myself with the reservation made by Romer L.J. at the end of his judgment in regard to possible arguments as to the effect on the construction and operation of testamentary directions as to death duties of the abolition of legacy and succession duties brought about by the Finance Act, 1949. So far as the present will is concerned, I find nothing in that enactment to affect the conclusion expressed above on this aspect of the case, and no argument founded upon it was presented to us on the appellant's behalf.

ROMER L.J. I am in full agreement with the reasons upon which Jenkins L.J. has founded his conclusions that this appeal should be allowed. It is as well, however, that I should shortly state my opinion on the question whether a gift of a legacy "free "of death duties" or even "free of all death duties" suffices, without more, to exonerate the bequest not only from United Kingdom duties but also from those imposed in respect of the gift under the laws of a foreign state. In my judgment an exonerating provision in either of the above terms, if found in a will executed in Great Britain and in accordance with the testamentary formalities required by our law of a domiciled British subject, is prima facie confined in its operation to death duties exigible by the laws of this country; but if, in any given case, there are attendant circumstances of a quality and degree sufficient to show beyond reasonable doubt that the testator must have intended to

[10] [1908] 2 Ch. 365.
[11] [1914] 1 Ch. 847.
[12] [1915] 1 Ch. 592; 31 T.L.R. 227.
[13] 10 Ch.D. 279.
[14] 75 L.T. 415.
[15] [1914] 1 Ch. 854, 855.
[16] 10 Ch.D. 279.

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include freedom from foreign duties also then effect will be given to the intention so disclosed.

This view is in substance that which commended itself to Wynn-Parry J. in *In re Cunliffe-Owen.*[17] I agree with the observations of Bennett J. in *In re Norbury*[18]—though it is true, I think, that what he said went farther than that case required—as to the probable ignorance of British testators of duties payable upon death under foreign systems of taxation. The fiscal legislation of this country is a matter of which a testator can from time to time inform himself and he can accordingly, by codicil, remove or alleviate such burden as he may have imposed by his will on his residuary estate in favour of the pecuniary legatees if he considers that, by reason of changes in the law, that burden will prove too heavy at his death. I doubt, however, whether the average testator knows (nor can he easily ascertain) much about the death duty legislation in the foreign country or countries where some of his assets may be situate, or where the legatees reside, and much less will he know what changes may occur in such legislation between the dates of his will and of his death; nor, indeed, can he know, when he makes his will, where the legatees will be living when his death brings it into operation. In these circumstances it would be difficult for him to keep the same balance as between the pecuniary and residuary legatees which changes in foreign fiscal legislation might render desirable as he could keep in relation to similar legislative changes at home. Accordingly, I cannot but think that in the absence of some clear direction to the contrary in the will, or of sufficiently compelling attendant circumstances, it is a safe and right assumption that British duties, and those alone, are within the ambit of words of exoneration such as those to which I have referred. In the present case this assumption is, in my opinion, fortified by the express reference which the testatrix made to what was then a British duty ("free of legacy duty and all other duties"); and, as I agree with my brother Jenkins that the surrounding or attendant circumstances are quite insufficient to show that the testatrix had Canadian succession duty also in mind, the prima facie rule must, in my judgment, be applied.

I would add in conclusion that what I have said is quite without prejudice to any arguments that may be addressed to the court in any future case based upon the change in death duties which was effected by the Finance Act, 1949. That statute was not discussed or even referred to by either side on the present appeal.

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[17] [1951] Ch. 964.

[18] [1939] Ch. 528; 55 T.L.R. 589; [1939] 2 All E.R. 625.

SOMERVELL L.J. I agree with Jenkins L.J. that this appeal should be allowed for the reasons which he gives on the assumption that the words of clause 2 of the will do not apply to Canadian succession duty. I would, however, myself like to reserve this latter question and in particular whether there is a rule as laid down by Wynn-Parry J. and accepted by my brethren. In the first decision relied on Bennett J. said he supposed not many English testators knew much about death duties imposed by the laws of foreign countries. I think such knowledge would be a good deal more widespread now. It may be that the express reference to a specific English duty in the present formula might limit the general words. If, however, one takes a bequest of £5,000 to " X " free of " all death duties " or " death duties," I would like to be free to construe those or similar words unassisted by any rule. Having regard to the fairly common incidence of " double " death duties I would myself have been inclined to construe the words as meaning all death duties which, but for this provision, would diminish the £5,000. To say that it would have been easy for a testator to make clear that he meant foreign duties, assumes that he knows the rule that, for example " all " may mean " British." If he does not know the rule he might well think that " death duties " mean any death duties that might otherwise diminish his legacies. The question may well depend on whether the testator is presumed to be calculating what will remain in residue or expressing sufficiently clearly an intention that the legatee shall get the sum stated. In the present case it is not necessary to decide the question, but on the grounds suggested I would regard it as open for this court.

I agree that the appeal should be allowed in the sense indicated by my brother Jenkins.

Appeal allowed.

Solicitors for all parties: *Jacobson, Ridley & Co.*

H. C. G.

1953
Jan. 12, 13.

Vaisey J.

In re ALLEN, DECD. FAITH *v.* ALLEN.

[1952 A. 1301.]

Will—Condition precedent or qualification—Uncertainty—Provision that devisee "shall be a member of the Church of England and "an adherent to the doctrine of that Church."

A testator devised certain freeholds, after life interests, to the eldest of the sons of his nephew F "who shall be a member of "the Church of England and an adherent to the doctrine of that "Church," with a gift over:—

Held, that, both singly and in conjunction, the expressions "a member of the Church of England," and "an adherent to the "doctrine of that Church" were void for uncertainty.

In re Tegg [1936] 2 All E.R. 878; *In re Lockie* [1945] N.Z.L.R. 230; and *In re Biggs* [1945] N.Z.L.R. 303, applied.

ADJOURNED SUMMONS.

Henry George Allen K.C., who died in 1908, by a codicil to his will, devised the estate of "Paskeston" in Pembrokeshire, subject to life estates which expired in 1952, to the eldest of the sons of his nephew Francis "who shall be a member of "the Church of England and an adherent to the doctrine of that "Church."

A summons was taken out in connexion with certain questions arising out of the testator's dispositions, including the question (which alone calls for a report) whether the limitation set out above was void for uncertainty.

R. O. Wilberforce for the trustees.

J. P. Hunter-Brown for a son of Francis, in support of the gift. The limitation here is a description or qualification, not properly a condition. If it is a condition, it is a condition precedent. The court will seek to uphold a gift such as this, because if the qualifying words are held to be uncertain the gift fails; whereas in the case of a condition subsequent, if there is an uncertainty, it is the condition which fails, and the gift is confirmed.

The fact that it may be difficult to decide whether a particular individual complies with the qualification is of no importance in deciding the question whether the words of the qualification are void for uncertainty. The language does present an intelligible concept, and it would be wrong to treat a qualification or condition precedent with the same strictness as a defeasance clause. [He referred to *In re Perry Almshouses.*[1]]

N. P. M. Elles for interests adverse to the gift. The qualification here is expressed in two stages, and each of them is void for uncertainty. The qualification "member of the Church of "England" is far too vague a concept for judicial determination; the same can be said of "an adherent to its doctrine." Adherence can exist in many degrees, and includes belief, a matter which the court cannot determine. The doctrine of the Church is set out in the Thirty-nine Articles, the Prayer Book and the Ordinal; the court cannot determine whether a claimant believes or does not believe in the doctrine therein set out.

In *In re Tegg* [2] it was held that a condition subsequent that the beneficiaries should "conform to and be members of the "Established Church of England" was too uncertain. Two New Zealand cases support the same proposition, *In re Lockie* [3] and *In re Biggs.*[4] [He referred also to *Clayton* v. *Ramsden.*[5]]

C. R. D. Richmount, for a similar interest, adopted the argument set out above.

Hubert A. Rose for a younger son of the nephew Francis. Both "membership" and "adherence" can be ascertained without difficulty by the conduct of the person concerned. Subject to cross-examination (which has not been required in this case), the assertions on oath of the person concerned are conclusive.

In re Perry Almshouses [6] shows that membership of and adherence to the Church of England can be concluded from practical tests of conduct. The testator could only impose some test of outward conduct, as no one can read the bottom of a man's mind.

D. A. Ziegler for a further defendant.

VAISEY J. [after stating the facts]. The question which arises is this: Is this description, qualification or condition, that the beneficiary is to be a member of the Church of England and an adherent to its doctrine, a description, qualification or condition which is sufficiently certain to be operative in law ?

There is some authority which seems to border upon this point; but, looking at the matter, first, in the absence of authority, it is, I think, notorious that what is meant by being a member of the Church of England is by no means settled or ascertained. For some purposes every parishioner who does not definitely dissent from the teaching and discipline of the Church is a member of the Church of England. Every parishioner is entitled to be buried in the churchyard of his parish; every parishioner is entitled under the Canons of 1603 to bring his child to be christened in the church, even though he himself or the mother herself has never been in any sense a practising churchman or churchwoman. But membership of the Church of England certainly means in some collocations anybody who does not actively dissociate himself or herself from the Church of the land; which can be described, if one so chooses to describe it, as part of the Catholic Church of God, or as an association which derives in some way its concomitant powers or duties from the legislation at the time of the Reformation. In some respects nonconforming Christians are (and, indeed, they are very apt so to describe themselves) members of the Church of England who do not conform; and that is why a person who has been baptized but attends a Wesleyan chapel or a Congregational or other dissenting place of worship will often say: I am a member of the Church of England, although I do not conform to it.

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[1] [1898] 1 Ch. 391; [1899] 1 Ch. 21, C.A.

[2] [1936] 2 All E.R. 878.

[3] [1945] N.Z.L.R. 230.

[4] Ibid. 303.

[5] [1943] A.C. 320.

[6] [1899] 1 Ch. 21.

Therefore, I think that the question whether a person is or is not a member of the Church of England is one which may be answered in many different ways, according to the subject-matter under discussion. As I have said, in a village every baptized Christian is entitled to be buried in the village churchyard; and, subject to certain safeguards, which, again, are rather controversial, to be married in the parish church; indeed, until very recent times it was the only place in which one could get married, as the legislation under which marriage in the register office is permitted is quite modern; and every person was treated as a member of the Church of England who was entitled to be married in the building which was the church of the parish in which he or she resided. That is one view of what "a member "of the Church of England" means.

Another meaning and a much narrower meaning is this: a member of the Church of England is a person who, having been baptized and confirmed, regularly attends the parish church, conforms, so far as he can, to the discipline which is laid down by the formularies, and has his name on the electoral roll of the parish; who would call himself "C. of E." or, at any rate, would say negatively: "I am not a dissenter or a nonconformist; I am a churchman or a churchwoman." That is another sense in which the description "a member of the Church of England" might be used.

Between these two views, however, there is a fairly wide gulf and, indeed, apart from the church-people, on the one hand, and the nonconforming Christians on the other, there are a vast number of people who really do not know very much about it; who, when asked to put down what their religion is, would probably say "C. of E." as giving the least trouble. That happens in the Army, where a man is said to be "C. of E." if he cannot affirm that he belongs to any other body.

So far as concerns "a member of the Church of England," I cannot think that those words by themselves are really capable of any definite, certain significance; but then, added to those words in this will are these curious words "and an adherent to the doctrine of that Church." Be it observed that it is not "doctrines" but "doctrine."

One question which I have to consider is: How do you adhere to the doctrine of a Church? Of course, adherence is a metaphor; it refers to sticking something on to something else; but the metaphorical use of the word is well established, and you may adhere to a political doctrine, or you may adhere to a religious doctrine in a very vast number of methods and to many varying degrees. If a man is asked, for instance, if he is a Conservative in politics or a Socialist in politics, and is further asked: "Do you adhere to the doctrine of Socialism?" or: "Do you adhere to the doctrine of Conservatism?" he would probably be rather puzzled, but he would be quite prepared to say generally: "If I am a Socialist, I have to adhere to that doctrine," or: "If I am a Conservative, I have to adhere to the doctrine which is laid down by the party leaders."

All that is very vague, and almost equally vague is the consideration of adherence to the doctrine of a Church. Just as in the Jewish communities there are various forms of Judaism—strictly orthodox Judaism, liberal Judaism and other forms of intermediate belief and practice—in the same way there are within the comprehensive walls of the Church of England varying ideas of teaching (which, of course, is the same thing as doctrine); and there are a large number of members of the Church of England (in whichever sense you use those words) who adhere to the doctrine in some respects whole-heartedly, in

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some respects half-heartedly, and who in other respects will say that they do not much care about it; it does not seem to them to have any bearing on practical life. But how far adherence must go before it ceases to be adherence is, to my mind, a problem which is entirely beyond the wit of man, and certainly past any function which this court can exercise. If one asks a man if he adheres to the doctrine of the Church of England, he may say "Yes"; but he would certainly want more explanation, I should have thought, before he allowed himself to be pinned down to such a statement as that. "What do you mean?" would be his proper retort; "Do you mean that I have to take "the words of the three Creeds of the Church; that I have to "believe them without any sort of qualification?" One may reply that there are diverse views about this and that no doubt he will have some liberty of choice; but to say that one adheres to the doctrine is obviously a statement of so wide and unqualified a character that no one would like to make it unreservedly, any more than he would like to answer the question: "Are you a man of good life; are you a man of good "faith?" Who, with knowledge of his own shortcomings, would answer that question without hesitation?

I should have thought that "adherence to the doctrine" of a church was something so uncertain as to its quality, so uncertain as to the degree of adherence, that it is really impossible to say that it is sufficiently certain to make it quite plain, as I think it has to be made quite plain, that A.B. or C.D. or any other person is not only a member of the Church of England (having first decided what one means by that) but an adherent to the doctrine of that church. How is it to be said that he adheres to the doctrine of the Church of England? What is the doctrine of the church? It is a body of beliefs of a very wide character, covering the whole of human experience and divine revelation, but not capable of being reduced to the certainty of a code or anything of that sort.

As to authority, I have been referred to *In re Perry Almshouses.*[1] The headnote in the court of first instance reads: "The founder of an eleemosynary charity prescribed by the "instrument of foundation that the objects should be selected "from among persons who should have (1) regularly attended "divine service at the parish church for a fixed period, (2) been "partakers of the Holy Communion, (3) lived a Godly, righteous

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[1] [1898] 1 Ch. 391.

" and sober life to the glory of God's Holy Name, and that the " trustees should be members of the Church of England." It was held that that was a charity the endowment whereof was held for the benefit of members of the Church of England.

I think that a different kind of test would have to be applied in admitting people to almshouses from that which is required in order to qualify a man to take a benefit under a will. Stirling J. said [2]: " Whatever difficulty there may be in giving " a strict legal definition of what constitutes membership of the " Church of England, I think that a person who has been " baptized, has been confirmed, or is ready and desirous to be " confirmed, and is an actual communicant, does hold the status " of a member of that church, and would be ordinarily regarded " and spoken of as such." In the Court of Appeal [3] the judgment of Stirling J. was upheld, and it was held (and that was the only point in the case) that it was a charity for the benefit of members of the Church of England as such. I do not find in the judgments anything particularly helpful.

I also derive little help from *Clayton* v. *Ramsden*,[4] for one reason because that case was concerned with a condition subsequent, where I think that the position is different, in spite of what is said in one of the cases (*In re Biggs* [5]), to which I shall refer presently, where it is said that there is no difference between a condition precedent and a condition subsequent in considering questions of certainty or uncertainty.

In *In re Tegg* [6] the words in question were: " I desire " that my daughter and any children she may bear should at all " times conform to and be members of the Established Church of " England." Farwell J. held that that condition was void for uncertainty, since it was open to grave doubt whether any particular act or omission in the future would bring about a forfeiture.

That, again, was a case of a condition subsequent; but I think that the reasoning of that case is equally applicable to the present case, which is one of a condition precedent or a qualification. Farwell J. said [7]: " In the present case the first " condition which is imposed on this lady is that she herself " and her children are at all times to conform to and be members " of the Established Church of England. It may be—I am not " deciding this—that if the testator had been content to say

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[2] [1898] 1 Ch. 391, 400.

[3] [1899] 1 Ch. 21.

[4] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16.

[5] [1945] N.Z.L.R. 303.

[6] [1936] 2 All E.R. 878.

[7] Ibid. 881.

" 'should be members of the Established Church of England,' "that might be a matter of some certainty, but that is not "enough, because the lady and her children must 'at all times " 'conform to.' Now speaking for myself, I do not in the least "know what that means. It seems to me it would be quite "impossible to say, here and now, whether any particular act or "omission would be enough to render this condition operative." I think that he means "inoperative," but I am not quite sure. "Whether a person, merely because he has been baptized and "confirmed in the Church of England, but thereafter has ceased "to pay any attention to any religious services at all, can be "said to conform to the Established Church of England, I have "not the least idea."

There are in a volume of the New Zealand Law Reports two cases which seem to me to be helpful and, if I may say so, to be right. The first is *In re Lockie*.[8] In that case there were a large number of qualifications imposed by a testator, and to the one which is material I will allude in a moment. The headnote reads: "When a testator, who intends to declare that a "gift shall be divested unless the legatee adheres to a prescribed "form of religious faith, makes one statement of the events "upon which the forfeiture shall take place and the gift over "shall operate, and then later in his will, purports to restate "that condition of forfeiture, but does so in inconsistent language, "and the reconciliation is not clearly apparent, the court should "hold that the event or events upon which the gift is to be "forfeited have not been expressed with the precision which is "required by the law, and, consequently, that the condition "or conditions of forfeiture are void for uncertainty."

The conditions in question were that a particular person should be educated and brought up in the Protestant faith and should at all times remain a Protestant. Then, further on, the testator refers to adherence to the Protestant religion.

The case was argued at considerable length and the report of the arguments is very lengthy; but it was held that that condition was invalid on the ground that it was not sufficiently certain.

Smith J. said that he doubted whether the phrase "Protestant faith" was of any certainty and continued[9]: "The next "condition requires that" the man in question "shall adhere "to the Protestant faith at the time of attaining 25 years of

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[8] [1945] N.Z.L.R. 230.

[9] Ibid. 245.

" age. For the reasons already given concerning the term " 'Protestant faith,' this condition is also void on the ground " of uncertainty but there are other reasons for the same con- " clusion. What does the word 'adhere' precisely signify? " In my view, there must be grave doubt as to what particular " course of conduct will constitute adherence."

Then he referred to an earlier case in New Zealand, in which the expression " voluntary adherence " was used, but, having considered that, and after pointing out the example was given before the decision in *Clayton* v. *Ramsden*,[10] he continued: " In " my view, the word 'adhere' is too uncertain to be enforced. " Would the condition be satisfied by a mere private adherence " to the Protestant faith or would some public profession be " required? Would outward adherence to the Protestant faith " be sufficient whatever the private faith? Even if the court " could determine these matters, what degree of adherence " would be required? How much Church attendance would be " required? Would it be sufficient . . .?" and so on, with reference to the answer which the claimant would have made if there had been a census, and he had been asked to declare his religion.

The other case is *In re Biggs*,[11] of which the headnote reads: " A gift by will upon condition that the donee should be an " 'adherent of . . . the Church of England' is void for un- " certainty. The standard of certainty required is the same " whether the condition is a condition precedent or a condition " subsequent." There *Clayton* v. *Ramsden*[12] and *In re Lockie*[13] were applied by Callan J., who tried the case.

The words in that case were very similar to the words with which we are now concerned, and I do more than share the doubt expressed in those cases; I agree with the conclusions which were reached that the words were not sufficiently certain, either as conditions subsequent or conditions precedent or as qualifications, to justify one in saying that they could be considered as imposing a certain obligation and having a precise and ascertainable significance. I think that " member of the Church " of England " is a very uncertain phrase and, even if the matter had stopped there, I should have felt doubt about it. Farwell J. was very careful not to express any view about it. There are so many views as to what " member of the Church of England "

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[10] [1943] A.C. 320.
[11] [1945] N.Z.L.R. 303.
[12] [1943] A.C. 320.
[13] [1945] N.Z.L.R. 230.

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means that I should have thought that those words, even alone, were quite incapable of having attached to them a definite meaning. I think that the difficulty is even greater when you go on to say " and an adherent to the doctrine of that Church."

Whatever a man may say, whatever he may think, whatever his friends or neighbours may think, or whatever his friend or closest companion may think on the question whether the man is an adherent to the doctrine of the Church, there is so much uncertainty, so much vagueness, so much room for doubt, so much room for difference of opinion and so much room for differing interpretations that, adopting the reasoning in the two New Zealand cases and considering the matter as best I can, I come to the conclusion that the expressions " a member of the " Church of England " and " an adherent to the doctrine of " that Church " are both singly and in conjunction void for uncertainty.

I do not think that the testator has expressed himself with that clarity which is necessary, whether in a condition precedent of this kind or in a condition subsequent. Of course, the matter would be very easily made effective by saying that the qualification should be " who shall declare himself at some particular " time to be a member of the Church of England and shall also " at that time declare himself to be an adherent to the doctrine " of that Church," because, if the qualification of the legatee is to be an overt act, such as a declaration by himself, which can be ascertained to have been made or not to have been made, then there is no difficulty at all about the meaning.

Therefore, I declare that the devise of the testator's dwelling-house " Paskeston " and other property to the eldest of the sons of Francis Seymour Allen, who should be a member of the Church of England and an adherent to the doctrine of that Church is void for uncertainty.

Declaration accordingly.

Solicitors: *Thicknesse & Hull, Capel Cure & Ball; Hore, Pattisson, Bathurst, Summerhays & Co.; Andrew, Purves, Sutton & Creery; Robbins, Olivey & Lake; Helder, Roberts & Co., for Walters & Williams, Carmarthen.*

F. R. D.

In re JONES, DECD. MIDLAND BANK EXECUTOR AND TRUSTEE CO. LD. *v.* JONES AND OTHERS.

1953
Jan. 22.

Danckwerts J.

[1952 J. No. 1338.]

Will—Condition subsequent—Uncertainty—Annuity—Forfeiture—" If " at any time . . . my . . . daughter . . . shall have social or other " relationship with " a certain named person—" In the uncontrolled " opinion of " the trustees—Validity.

A testator, by his will, directed his trustees to hold his residuary trust fund after the death of his wife upon trust to purchase an annuity for his daughter D., and he directed " that if at any time " . . . my . . . daughter D. shall in the uncontrolled opinion of " the company [the trustees] have social or other relationship with " [a certain named person] . . . then in such case as from the " occurrence of such event my said daughter . . . shall absolutely " forfeit and lose one half of the annuity payments hereinbefore " directed to be paid to her . . ." and that such half of the annuity payments should be paid to D.'s sister for life, and after that sister's death to three named charities. On the question whether the direction for forfeiture was valid:—

Held, that the provision for the forfeiture of half of the daughter's interest was insufficiently defined to enable the trustees to come to a proper decision, and that, accordingly, the condition subsequent was void for uncertainty. The mere fact that the decision was referred to the trustees did not get over the difficulty.

Jeffreys v. *Jeffreys* (1901) 84 L.T. 417; 17 T.L.R. 356, and *In re Coxen* [1948] Ch. 747; [1948] 2 All E.R. 492, applied.

ADJOURNED SUMMONS.

By his will dated December 8, 1947, a testator, John Hibbert Jones, provided by clause 10 (b) of his will that his residuary trust fund should be held by his trustees after the death of his wife " upon trust to purchase an annuity in the name of " the company [the trustees] in favour of my . . . daughter " Doris Mabel Jones and to pay the income produced thereby " to the said Doris Mabel Jones in such manner as the " company shall in its uncontrolled discretion appoint. . . . " Provided always and I hereby direct that if at any time during " the lifetime or after the death of my said wife my said daughter " Doris Mabel Jones shall in the uncontrolled opinion of the " company have social or other relationship with [a certain " named person] . . . then in such case as from the occurrence " of such event my said daughter Doris Mabel Jones shall

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

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"absolutely forfeit and lose one half of the annuity payments "hereinbefore directed to be paid to her . . ." and that such half of the annuity payments should be paid to his daughter Gladys Joyce during her life and after her death to and equally between three named charities.

The trustees took out the present summons to ascertain, inter alia, whether the direction for forfeiture contained in clause 10 (b) was valid.

J. W. Brunyate for the plaintiffs.

Geoffrey Cross Q.C. and *W. F. Waite* for the daughter, Doris Mabel Jones.

M. J. Albery, *R. R. Walker* and *Wilfrid Hunt* for charities interested under the will.

V. M. C. Pennington and *R. H. Walton* for other defendants.

The arguments are set out in the judgment.

DANCKWERTS J. There is no doubt whatever that this condition imposed upon the gift of the annuity is a condition subsequent and, as it is a condition subsequent which may involve forfeiture, there is no doubt, again, as to the principle of law which is to be applied, namely, "that condition must be "such that the court can see from the beginning, precisely and "distinctly, upon the happening of what event it was that "the preceding vested estate was to determine," *per* Lord Cranworth in *Clavering* v. *Ellison*.[1] That is the principle which I have to apply, and, accordingly, I must construe this forfeiture clause strictly.

It has been argued on behalf of those who would, in the event of forfeiture, gain a benefit, that the material words, namely, "have social or other relationship with" the person in question, are not too uncertain and have a meaning which can be clearly ascertained; and I have been referred by Mr. Wilfrid Hunt to *Dormer* v. *Knight*,[2] which was a decision of the Court of Common Pleas sitting in banc, in regard to a case which was tried before Sir James Mansfield C.J., with a jury. The words in that case were "associate, continue to keep company with, or cohabit, "or criminally correspond with" a certain person. On the happening of any of those events a certain annuity was to cease and a smaller annuity was to be substituted. The report states:

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[1] (1859) 7 H.L.C. 707, 725.

[2] (1809) 1 Taunt. 417.

" The court were clear that this deed had received a perfectly " right construction; for it appeared by the evidence, that short " of criminal intercourse, Mr. F. was a suspected person." What he had done, it appears, was simply to call in the ordinary way at the house of the person in question and leave " his card, like " any other visitor; he had sometimes been admitted; but the " witnesses had never seen any improper behaviour in him, nor " any appearance of levity in the lady "—whatever that may mean. The court held that " the words of the deed were as " general as could be, and went much further than the mere " exclusion of criminal cohabitation; the intention was, to put a " stop to all intercourse whatever between these two persons. " The receiving a man's visits whenever he chooses to call, is " associating with him. The parties had chosen to express " themselves in those terms, and the words must receive their " common meaning and acceptation."

The point of that case, for the purpose of Mr. Hunt's argument, is that he submits that " relationship " has exactly the same meaning as " association," and that that decision, therefore, shows that the word " associate " is not too uncertain to be given a meaning by the court and that, as the Court of Common Pleas had no difficulty in construing the word in that case, no difficulty arises in the present case; but it is to be observed, so far as *Dormer* v. *Knight* [2] is to be used as an authority, first, that the question of uncertainty operating to prevent a forfeiture being effective was never argued at all—the effect of uncertainty upon conditions subsequent was never discussed before the court—and, secondly, that the word " associate," which possibly by itself may mean a more positive act than merely the existence of an association, was in that case to be found in company with other words, " continue to keep company with, or cohabit, or criminally " correspond with," all of which seem to me to denote something active being done by the person who was not to associate with the other named person.

In *Jeffreys* v. *Jeffreys*,[3] however, which was a decision of Farwell J., the court was of opinion that the word " associate " did present difficulties. In that case the testator by his will gave a life interest in his residuary estate to his daughter by his first wife, and by a codicil he declared that if she should " in any way " associate, correspond, or visit with any of my present wife's

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[2] 1 Taunt. 417.

[3] (1901) 84 L.T. 417; 17 T.L.R. 356.

"nephews or nieces," then the life interest was to be forfeited and a gift over was to take effect. Farwell J. held that the condition, which was, of course, a condition subsequent, was void for uncertainty. In the course of his judgment he said [4]: "Taking, "for instance, the word 'associate'—does that mean simply for "pleasure or business, or both?"

It has been argued, on the other hand, that in the present case that difficulty at least does not arise, because it is "social "or other relationship," and that therefore, it is relationship of any kind, in any form, which is forbidden by the clause.

There is another point which has been argued which I will consider later in my judgment, viz., that it is the opinion of the trustees which is the decisive matter; but, before turning to that question, I will consider the meaning of the words "social or other "relationship." I do find some difficulty in knowing exactly what the words mean. After reference to the Oxford Dictionary, it appears that the word "relationship" may have a number of meanings. It obviously does not in the present case mean any connexion by blood or marriage between the two persons in question. It seems to me that there may be a difference between "relationship" and "association" (if they are otherwise the same, of which I am not satisfied), the former referring merely to the existence of a state of affairs, and the word "associate" (in the context of a person being prohibited from associating with another) connoting some active step.

Giving the best meaning that I can ascertain to the word "relationship" in the present case, I am of opinion that "relationship" means simply the existence of a relative state of facts between the two persons named or, at any rate, that that situation may be included in the words. Therefore, it seems to me that it may include all kinds of things: for instance, such things as being members of the same congregation, members of the same bus queue, citizens of the same State and all manner of situations which merely denote a passive existence of facts, and that the provision in this will is not, therefore, merely a prohibition against active steps being taken on the part of Doris Mabel Jones in regard to the person in question.

Accordingly, I share the difficulties which were felt by Farwell J. in *Jeffreys* v. *Jeffreys* [5] in ascertaining what is the precise meaning of such words as the relevant words in the present case and, unless it is cured by the reference to the opinion of the trustees, it seems to me that this clause cannot be regarded as sufficiently certain to be upheld as a forfeiture clause or a condition subsequent. The words in the present case are "shall "in the uncontrolled opinion of the company have social or other "relationship." Mr. Albery has submitted that that surmounts the difficulty, because the guiding factor is not the existence of "social or other relationship," but the existence of "the uncon-"trolled opinion" on the part of the executor company, the bank.

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[4] 84 L.T. 417, 418, 419.

[5] 84 L.T. 417; 17 T.L.R. 356.

He has referred me to a decision of the House of Lords, which certainly is of great interest in regard to the matter: *Dundee General Hospitals Board of Management* v. *Walker.*[6] In that case, in order that a named body should qualify for a legacy, the trustees had to be satisfied as regarded a certain hospital, the Dundee Royal Infirmary, that "the said infirmary has not been "taken over wholly or partly by or otherwise placed under the "control of the State or of a local authority or of a body directly or "indirectly responsible to the State and/or a local authority." As Mr. Albery perfectly correctly said, after quoting a well-known observation of Bowen L.J. that the state of a man's mind was as much a fact as the state of his digestion, it is the existence of an opinion or the non-existence of a particular opinion on the part of the company, the trustees, which is the test of forfeiture or otherwise in the present case.

Reference to the report of that case, however, shows that the words there in question formed a condition precedent and, unless the trustees were satisfied that a certain condition existed, the condition precedent was not fulfilled so that the legacy could not be claimed; and, as Mr. Cross has pointed out, the existence of a doubt in the minds of the trustees was sufficient to prevent the condition from being fulfilled, so that the legacy could not be claimed and was not payable; the legacy would never be payable unless the existence of a particular conviction on the part of the trustees was proved or was the fact.

In the present case, however, the opinion of the trustees is substituted for the opinion of the court, and it is the trustees who have to decide whether or not a certain obscure and difficult state of facts has occurred; the trustees might be unable to decide the question just as the court might be unable to decide it, and further the court might have to decide the matter or to attempt to decide the matter upon a reference to it by the trustees.

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[6] [1952] 1 All E.R. 896, 898.

In the circumstances it appears to me that the present case is nearer to the decision of Jenkins J. in *In re Coxen*,[7] where this passage appears in the judgment[8]: "I have so far treated the "condition as if it was simply in the terms 'if she shall have "'ceased permanently to reside,' whereas its actual terms are "'if in the opinion of my trustees she shall have ceased per-"'manently to reside.' That I think makes a very material "difference. The opinion of the trustees that the double event "has happened, and not simply the happening of the double "event, is what brings about the cesser of Lady Coxen's interest. "If the testator had insufficiently defined the state of affairs on "which the trustees were to form their opinion, he would not "I think have saved the condition from invalidity on the ground "of uncertainty merely by making their opinion the criterion, "although the declaration by the trustees of this or that opinion "would be an event about which in itself there could be no "uncertainty." Then he goes on to state that he thinks that the relevant double event is sufficiently defined to make it perfectly possible for the trustees to decide.

It seems to me that those observations bear directly upon the point which I have to consider in the present case, and that I should apply them, with the result that in the present case the mere fact that the decision of the question is referred to the trustees' opinion does not overcome the difficulty of uncertainty, if uncertainty as to the event involving forfeiture exists. As I have already indicated my view that this is a case in which there is uncertainty concerning the event upon which the forfeiture is to take place, the fact that the decision is referred to the trustees does not get over the difficulty.

Accordingly, I come to the conclusion that the provisions of this clause for forfeiture of the annuity provided for Doris Mabel Jones are not enforceable, and are void for uncertainty.

Declaration accordingly.

Solicitors: *Waterhouse & Co.*, *Sharpe, Pritchard & Co.*, *G. & G. Keith; Wilde, Sapte & Co.*, *Clayton, Leach, Sims & Co.*, *Amery-Parkes & Co.*

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[7] [1948] Ch. 747; [1948] 2 All E.R. 492.

[8] [1948] Ch. 747, 761, 762.

1953
Feb. 9, 16.

Roxburgh J.

In re JON BEAUFORTE (LONDON) LD.

APPLICATIONS OF GRAINGER SMITH & CO. (BUILDERS) LD., JOHN WRIGHT & SON (VENEERS) LD., AND LOWELL BALDWIN LD.

[No. 00412 of 1952.]

Company—Winding up—Judgment debts in respect of ultra vires contracts—Whether capable of admission to proof.

A company was authorized by its memorandum of association to carry on the business of costumiers, gown makers, and other activities ejusdem generis. The company decided to undertake the business of making veneered panels, which was admittedly ultra vires, and for this purpose erected a factory at Bristol. The company later went into compulsory liquidation.

A number of proofs of debt were lodged, which were rejected by the liquidator on the ground that the contracts to which they related were ultra vires. Applications by way of appeal were lodged, as indicated below, by three creditors, none of whom had actual knowledge that the veneer business was ultra vires:

(1) A firm of builders who constructed the factory had brought an action claiming £2,078 as owing; the company put in a defence that the work had been unlicensed. Later, the company consented to judgment for £2,000 payable in four instalments, the whole of the original debt or the balance thereof remaining due to be payable in the event of default. Default having been made on the first instalment, the creditors signed final judgment for £2,078;

(2) A firm supplied veneers to the company valued at £1,011; being unpaid, they issued a specially indorsed writ and recovered judgment summarily in default of defence;

(3) A firm sought to prove for a simple contract debt of £107 in respect of coke supplied to the factory; they contended that the fuel might have been used for legitimate purposes. They had received letters from the company on paper headed "Veneered "Panel Manufacturers":—

Held, dismissing the applications, (1) that no judgment founded on an ultra vires contract could be sustained unless it embodied a decision of the court on the issue of ultra vires, or a compromise of that issue; *Great North-West Central Railway Co.* v. *Charlebois* [1899] A.C. 114, considered and explained; (2) that the suppliers of the coke were fixed with clear notice of the purposes of the factory; but (3) that the rejection of the applicants' proofs was without prejudice to any rights which they might have (a) of tracing any of their money or property, or (b) of participating in the distribution of surplus assets, after provision had been made for the claims of proving creditors, costs and expenses.

APPLICATIONS on appeal from rejection of proofs by liquidator.

The company, Jon Beauforte (London) Ld., was in compulsory liquidation. According to the memorandum of association the objects of the company were: " (a) To carry on the business " of costumiers, gown, robe, dress and mantle makers, tailors, " silk mercers, makers and suppliers of clothing, lingerie, and " trimmings of every kind, corset makers, furriers, general " drapers, haberdashers, milliners, hosiers, glovers, lace makers " and dealers, feather dressers and merchants, hatters, boot and " shoe makers, dealers in fabrics and materials of all kinds, " ribbons, fans, perfumes and flowers (artificial and natural); " (b) To carry on any other trade or business whatsoever which " can, in the opinion of the board of directors, be advantageously " carried on by the company in connexion with or as ancillary " to any of the above businesses or the general business of the " company"; and " (v) To do all such other things as are " incidental or conducive to the above objects or any of them."

Towards the end of 1949 the company decided to undertake the business of manufacturing veneered panels, which was admittedly ultra vires, and accordingly entered into an oral contract with Grainger Smith & Co. (Builders) Ld. (admittedly ultra vires) for the construction of a factory on the Bedminster Trading Estate near Bristol on a " cost plus " basis, which amounted to £2,078 9s. 3d. On September 20, 1950, the builders sued the company for that amount. The action was transferred to an official referee, and leave to defend was given. The defence was that the work was not licensed. On May 30, 1951, an order was made by consent that all proceedings be stayed and that the company should pay £2,000 in four instalments and that, if the company made default, the builders might sign judgment for the sum of £2,078 9s. 3d., or for the balance thereof then remaining due. The company made default on the first instalment, and on August 9, 1951, the builders signed judgment for £2,078 9s. 3d. The earlier consent judgment was in the nature of a compromise, but was arrived at on the footing that the contract was intra vires. The builders lodged a proof for £2,078 9s. 3d., which the liquidator rejected.

John Wright & Sons (Veneers) Ld. supplied the company with veneers, and sued for the price, namely, £1,011 2s. 10d. The company did not defend the action or raise the issue of ultra vires, and the suppliers obtained leave to sign judgment under Order 14, r. 1, for that sum and costs. The purchase of the veneers was admittedly ultra vires. The liquidator rejected the supplier's proof.

On May 17, 1950, the company, on paper headed " Veneered " Panel Manufacturers; Plywood panels veneered in all woods "for interior decoration and furniture, wood block, strip and "parquet flooring," entered into correspondence with Lowell Baldwin Ld. which led to a supply of coke. The liquidator rejected a proof for the unpaid price.

It was conceded that the applicants had constructive knowledge of the company's memorandum, and that they had no actual knowledge that their contracts were ultra vires the company.

Charles Russell Q.C. and *G. B. Parker* for the builders. It is admitted that the contract for building the factory was ultra vires the company, and that a proof lodged in respect of a simple contract debt would be rightly rejected. But the builders' proof is based on a judgment, and the contract has merged in that.

In *Great North-West Central Railway Co.* v. *Charlebois*[1] it was held that a consent judgment could be set aside, if founded on an ultra vires contract, as in consenting to judgment the company was ratifying an ultra vires contract, which was an ultra vires act in itself. That case should not be extended beyond its proper ambit to a case where the parties to the action were bona fide at arms length. The action brought by the builders was defended by the company on the ground that proper building licences had not been obtained. The judgment obtained, in respect of which the proof was lodged, was not a consent judgment, although based on one; and the claim ought not to be defeated because the company failed to plead ultra vires in an action in which the parties were unaware that any such point arose.

The creditors have a subsidiary right to "follow the assets" into the factory they built if their main claim is rejected. That could be a proper subject of compromise, without raising any question of ultra vires.

K. L. Coghlan for the suppliers of veneers. In the action brought by my clients they recovered judgment in default of defence. The company did nothing; the facts are distinguishable from *Charlebois'* case.[2] To put in no defence is quite different from making a compromise or consenting to judgment; the company did nothing in the way of purporting to ratify an ultra vires contract. The judgment obtained was binding on the company as a going concern, and should also be binding on it in liquidation.

Peter Whitworth for the suppliers of coke. These claimants were never aware of the purpose for which the coke would be used.

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[1] [1899] A.C. 114.

[2] Ibid.

[Roxburgh J. They received letters from the company so headed as to make the purpose of the factory quite clear.]

There is nothing in the memorandum forbidding the company to buy coke; it might well be used for legitimate purposes. Under the Companies Act, 1948, a number of duties are imposed on a company which entail office work, so that an office must be maintained which requires heat. There is nothing to show that the coke was used for ultra vires purposes. [He referred to *In re London, Hamburg and Continental Exchange Bank, Zulueta's Claim,*[3] and *In re Phœnix Life Assurance Co., Howard and Dollman's Case.*[4]]

J. G. Strangman Q.C. and *T. D. D. Divine* for the liquidator. All persons dealing with the company must be taken to have notice of the contents of the memorandum of association. The coke suppliers must be taken to know that the company could transact business in gowns, but not in veneer panels. They had express notice from the company's notepaper what the activities at the factory were; their claim accordingly fails.

A contract which is ultra vires and void cannot be ratified or affirmed in any way afterwards; if it is litigated, the proceedings are ineffectual unless the question of ultra vires is raised and adjudicated on or made the subject of a compromise: *Charlebois'* case.[5] The judgments relied on by the creditors here do not bind the company, as there was no subject-matter on which they could be founded; it makes no difference whether the judgment relied on is a consent judgment, or a judgment based on a consent judgment, or a judgment in default of defence.

Further, it is a settled rule of bankruptcy law that the court will, in the interests of all the creditors, inquire into the consideration for a judgment debt: *Ex parte Kibble, In re Onslow.*[6] The Companies Act, 1948, provides by section 317 that the rules of bankruptcy are to be applied in the winding up of an insolvent company; and see *In re Home and Colonial Insurance Co. Ld.*[7] The result is the same; there was no consideration for the debt, and the claim was rightly rejected.

Russell Q.C. in reply. There is no real analogy between ratification, which deals with a contract on the footing that it exists, and submitting to a consent judgment, whereby the contract ceases to exist and is merged in the judgment.

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[3] (1870) L.R. 5 Ch. 444.

[4] (1863) 1 H. & M. 433.

[5] [1899] A.C. 114.

[6] (1875) L.R. 10 Ch. 373.

[7] [1930] 1 Ch. 102, 130; 45 T.L.R. 658.

The claimants had proper material for a valid compromise; if their direct money claim was defeated, they had a claim over to follow the assets, and that was not tainted in any way with ultra vires; the judgment can therefore be supported on that ground.

It cannot be said that the consent judgment was not obtained "fairly," in accordance with the language used in *In re Hawkins; Ex parte Troup.*[8]

Cur. adv. vult.

February 16. ROXBURGH J., reading his judgment:—I have before me three appeals against these rejections. As regards the last, the argument is that the company needed fuel for its legitimate business, and that the fuel merchant cannot be prejudiced by its misapplication. I need not consider what the position might have been if the fuel merchant had not had clear notice that the business, which the company was carrying on and for which the fuel was required, was that of veneered panel manufacturers. The correspondence shows that they had notice of that, and as they had constructive notice of the contents of the memorandum of association, they had notice that the transaction was ultra vires the company. Their proof was rightly rejected, although they and the other two claimants may have other rights arising out of these ultra vires transactions. The other two cases depend upon whether the claimants can pray their judgments in aid; for the transactions out of which they arose are admittedly ultra vires.

There seems to be but one authority upon the efficacy of a judgment obtained upon an ultra vires contract. It is the decision of the Privy Council in *Great North-West Central Railway Co.* v. *Charlebois.*[1] On September 9, 1891, the company sued Charlebois for breach of an ultra vires contract, and two days afterwards Charlebois sued the company to recover the balance due and for a lien. The question of ultra vires was not raised. By consent there was judgment against the company for a large sum and a declaration of lien. The Chancellor of Ontario had said in the court of first instance [2]: "It follows that, if the act is beyond the "power of the company to do or ratify, no judgment obtained by "the consent of the company treating it as authorized can remove "its invalidity, for the virtue of such judgment rests merely on

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[8] [1895] 1 Q.B. 404, 409.

[1] [1899] A.C. 114.

[2] Ibid. 116.

" the agreement of the parties, and the incapacity to do the act " involves the incapacity to consent that it be treated as valid." The majority of the Supreme Court took a different view. King J., delivering that judgment said [3]: " But now we come to " a wholly different question. Charlebois is not suing upon the " contract. That has become merged in the judgment rendered " upon it, and the present proceedings are to set aside that judgment or to restrain its enforcement. The learned chancellor " was of opinion that the judgment has no greater validity than " the contract, because it was determined by consent, and the " company could not validly give a consent to treat as valid what " was ultra vires. In the case of *In re South American and* " *Mexican Co.*,[4] decided subsequently to the chancellor's judgment, it is held that a judgment by consent creates an estoppel " to the same extent as a judgment where the court has exercised " a judicial discretion."

But their Lordships of the Privy Council disagreed with them, saying [5]: " But the difficulty is to reconcile an opinion that " the contract is ultra vires with an opinion that a judgment " obtained as this was is a binding judgment. The authorities " referred to by the Supreme Court do not relate to contracts " ultra vires. It is quite clear that a company cannot do what " is beyond its legal powers by simply going into court and " consenting to a decree which orders that the thing shall be " done. If the legality of the act is one of the points substantially " in dispute, that may be a fair subject of compromise in court " like any other disputed matter. But in this case both the " parties, plaintiff or defendant in the original action and in the " cross-action, were equally insisting on the contract. The " president, who appears to have been exercising the powers of " the company, had an interest to maintain it, and took a large " benefit under the judgment. And as the contract on the face of " it is quite regular, and its infirmity depends on extraneous facts " which nobody disclosed, there was no reason whatever why the " court should not decree that which the parties asked it to " decree. Such a judgment cannot be of more validity than the " invalid contract on which it was founded."

Now the first difficulty is to decide whether the Privy Council adopted the reasoning of the chancellor with only one reservation (namely, that where ultra vires or intra vires is a point substantially in dispute, that point may be validly compromised) or whether the Board declined to decide the issue between the chancellor and the Supreme Court in the general terms in which it was raised and confined themselves to holding that where both parties are equally insisting on the contract in the circumstances which existed in that case, a consent order cannot be valid.

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[3] [1899] A.C. 114, 117.

[4] [1895] 1 Ch. 37; 11 T.L.R. 21.

[5] [1899] A.C. 114, 123.

I think that the first alternative is to be preferred. "It is "quite clear," they said,[6] "that a company cannot do what is "beyond its legal powers by simply going into court and "consenting." That proposition seems to me to negative the basis of the judgment of the Supreme Court that a consent judgment raises an estoppel and to involve the adoption of the reasoning of the chancellor, with the one reservation to which I have referred. If that be so, the next question is to draw the line which bounds the principle and the reservation. It seems to me that any compromise made upon the footing that the contract is intra vires, and any judgment suffered in an action in which the defence of ultra vires is not raised, can be set aside because (applying the principle stated) it is ultra vires the company to proceed upon the footing that the contract is intra vires, whether by negotiating a compromise on that footing or by submitting to judgment without delivering an appropriate defence. Accordingly, I interpret the judgment of the Privy Council as meaning that in the case of an ultra vires contract no judgment founded upon it is inviolable, unless it embodies a decision of a court upon the issue of ultra vires or a compromise of that issue, and I adopt the reasoning which appears to lead to that conclusion. This decision was cited to Russell J. in *York Corporation* v. *Henry Leetham & Sons Ld.*, where he said[7]: "An ultra vires agreement cannot become intra vires by "reason of estoppel, lapse of time, ratification, acquiescence, or "delay." Accordingly, the proofs of the builder and the suppliers were rightly rejected.

In view of this conclusion, I need not further explore the arguments which I heard upon the question whether these judgments could be reopened in accordance with the principles applied in bankruptcy and liquidation to judgments generally. But the rejection of the proofs must be accompanied by a reservation of tracing rights which may arise, for the formulation of which I invite the assistance of counsel.

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[6] [1899] A.C. 114, 124.

[7] [1924] 1 Ch. 557, 573; 40 T.L.R. 371.

[It was agreed that the following terms should be included in the order: "This order is without prejudice to the questions "whether the applicants are entitled to trace any money or "other property of the applicants into any particular asset or "the proceeds of sale thereof and to participate in the distribution of any assets remaining in the hands of the respondent "liquidator after satisfaction of or provision for the claims of "creditors in respect of debts provable in the winding up and all "proper costs, charges and expenses in the liquidation."

It was further agreed that, as the three applicants had been selected to represent other creditors in a quasi-representative capacity, they should be entitled to their costs as between party and party.]

Applications dismissed.

Solicitors: *Gibson & Weldon, for Burley & Geach, Petersfield; and for Bayliss, Rowe & Co., Bristol; Syrett & Sons; Hatchett Jones & Co., for Bolton & Davidson, Bristol.*

F. R. D.

1953
Feb. 6.

Danckwerts J.

In re WILLIAMS' WILL TRUSTS. CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA *v.* WILLIAMS AND OTHERS.

[1952 W. 3687.]

Will—Construction—Advancement clause—For the purpose of "business"—Medical profession included—Purchase of house.

By an advancement clause in a will, the trustees were empowered to advance to the testator's son on his attaining 35 years of age "for the purpose of starting my said son in business or for the "advancement of any business with which he may be concerned."

The son was a doctor, and the trustees asked the court to determine whether the word "business" in the clause included the medical profession; and if so, whether, in the exercise of their power under the clause they were entitled to purchase a house to be used by the son for the purpose of his profession, or partly for that purpose and partly as a residence:—

Held, (1) that the word "business" in that clause was wide enough to include the medical profession. *Manchester Corporation* v. *Buttle* [1929] 2 Ch. 390; 45 T.L.R. 568 and *Rolls* v. *Miller* (1884) 27 Ch.D. 71 considered. (2) That, since the chances of an aspiring doctor to succeed to a practice must be largely affected by his ability to acquire suitable premises, the trustees were entitled to purchase a house for the son to be used for the advancement of his prospects in the medical profession, and where he might also reside.

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ADJOURNED SUMMONS.

John Huw Williams, by his will dated December 30, 1932, devised and bequeathed his residuary estate on the usual trusts for conversion, and after giving directions as to one-tenth, provided that the other nine-tenths were to be held upon trust for his son, Jack Islwyn Williams, subject to forfeiture in the event of bankruptcy and other events which would disentitle him from being a person entitled to receive the income, with the usual discretionary trust in favour of the son and his wife or their issue if the forfeiture should take effect. After the death of the son, there was a trust of the income for the son's widow for life and after her death trusts for his children or issue; and, in case of there being no issue, there were trusts for other persons who should eventually take that moiety. A power of advancement was added to the trust for the son by clause 4 (*c*) of the will.

That clause was in the following terms: "Provided neverthe- "less and I declare that notwithstanding anything hereinafter "contained on my said son attaining the age of 35 years my "trustees shall have power in their absolute discretion to raise "and pay to my said son any part or parts of the said nine-tenths "not exceeding altogether 25 per cent. thereof for the purpose "of starting my said son in business or for the advancement of "any business with which he may be concerned."

The testator died on October 10, 1937.

In 1934, after some initial uncertainty as to what occupation he would follow, the son decided to go into the profession of medicine, and he qualified as a doctor in 1942. He served some time in the Royal Army Medical Corps, and it was not until after the war that he had an opportunity of becoming a civilian medical practitioner.

He attained the age of 35 on September 20, 1943. He found considerable difficulty in obtaining a settled practice in medicine, and acted as assistant and locum tenens for various other doctors after the usual hospital appointments which a doctor obtains on becoming qualified. He desired that the trustees should exercise their powers under clause 4 (*c*) so that he could obtain a house with a surgery or, in certain circumstances, without a surgery, as he considered that his chances of obtaining a vacancy under the situation created by the National Health Service Act, 1946, were somewhat difficult unless he acquired suitable premises for the purpose of practising.

The plaintiffs, as executors and trustees of the will, asked the court to determine whether the purposes for which the power of advancement contained in clause 4 (*c*) of the will could be exercised included the purposes of the medical profession, and, if so, whether they were entitled in the exercise of that power to purchase a house to be used by the son for the purpose of his practice in the medical profession, or partly for that purpose and partly as a residence.

K. W. Rubin for the plaintiffs.

R. W. Goff for the son. The expression "business" should be construed so as to include a profession, and accordingly the profession of a doctor should come within this advancement clause. In *Manchester Corporation* v. *Buttle* [1] Eve J. held that premises used by a dentist partly for the practice of his profession were partly used for business purposes. In that case Eve J. said that he could not disregard the interpretation of the Court of Appeal in *Smith* v. *Anderson* [2] that the expression "trade or business" purposes included premises used for professional purposes. On those authorities it is submitted that this advancement clause clearly extends to professional purposes. [Reference was also made to the Oxford Dictionary.]

If the court holds that this clause includes advancement for the purpose of the medical profession, the trustees should be entitled to purchase a house for the son, in which he could carry on his practice, or in which he could reside and carry on his practice. If a doctor desires to set up on his own, he must have surgery premises, and even at his residence a doctor must always to some degree carry on his professional activities.

G. M. Parbury for other defendants. The meaning of a word must depend on the particular will in which it is found. In *Rolls* v. *Miller* [3] Lindley L.J. said [4] that not much help was obtained from dictionaries on the meaning of the word "business," and that it was necessary to find out the object with which it was used. Here, it is submitted that the father was thinking of helping his son in the kind of business in which he had placed him. The son had been apprenticed to a tea house, and it was that kind of thing which the father had in mind when he made this

[1] [1929] 2 Ch. 390.

[2] (1880) 15 Ch.D. 247, 258, 259.

[3] (1884) 27 Ch.D. 71.

[4] Ibid. 88.

advancement clause. At that date the son had not yet decided to enter the medical profession.

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DANCKWERTS J., having stated the facts, continued:—The question which is raised here is whether the trustees are entitled to make advances to the son in connexion with the acquisition by him of a house for the purpose of his practice in the medical profession. Further questions arise if that question is decided in favour of the son. I will, therefore, consider, first, the question of principle, whether the words "for the purpose of "starting my said son in business or for the advancement of any "business with which he may be concerned" include the purposes of the medical profession.

It seems to me that this clause ought not to receive a narrow construction, as it is plain that the object of the clause is to assist the son in providing himself with a gainful occupation in order to maintain himself in life.

It has been argued that I ought not to give a wider meaning to the words than advancement for a commercial business, because at the date of the will and, indeed, for some years afterwards, the son had not contemplated entering the medical profession. He had gone first into a tea firm, and afterwards to Canada, which suggests that ordinary commercial business was the occupation which he had in mind or was, at any rate, trying to undertake for the purposes of his maintenance. That does not seem to me to be a sound argument. I see no reason why the clause should be limited by those circumstances.

The meaning of the word "business" seems to me to be plain; on the meanings attributed to it in the dictionaries and in the authorities, the word "business" is capable of including the practice of a profession. The Oxford Dictionary gives these, amongst other, meanings: "12. A person's official or professional "duties as a whole; stated occupation, profession, or trade. . . "14b. A particular occupation; a trade or profession." That plainly includes the profession of a doctor. In *Smith* v. *Anderson*,[1] a case which, on its facts, has nothing to do with the present, Sir George Jessel refers with approval to various meanings of the word "business" in Johnson's Dictionary and in the Imperial Dictionary. In the latter dictionary he refers to the definition "'Business, employment; that which occupies the "'time and attention and labour of men for the purpose of profit

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[1] 15 Ch.D. 247.

"'or improvement.'" Sir George Jessel continues[2]: "That is "to say, anything which occupies the time and attention and "labour of a man for the purpose of profit is business. It is a "word of extensive use and indefinite signification."

Then, quoting again from the Imperial Dictionary, he said: "'Business is a particular occupation, as agriculture, trade, "'mechanics, art, or profession, and when used in connexion "'with particular employments it admits of the plural that is, "'businesses.'" And referring to the Act which he was seeking to construe, he said: "Therefore the legislature could not well "have used a larger word."

In *Manchester Corporation* v. *Buttle*[3] Eve J. was concerned with a local Act relating to waterworks: "Under section 16 of "the Manchester Corporation Waterworks and Improvement Act, "1869, no person is entitled to require, nor is the corporation "bound to supply, any dwelling-house in the borough with water "(otherwise than by meter or special agreement) where any part "of such dwelling-house is used for any trade or business purposes:—*Held*, that the residence of a dentist where he practised "the profession of dentistry was a dwelling-house used in part "for business purposes, and therefore the corporation was entitled "to demand and be paid an annual sum in addition to the ordinary "domestic and public water rates charged in respect of dwelling-"houses not so used, although the water supplied was used for "domestic purposes within the meaning of a local Act of 1847."

In *Rolls* v. *Miller*[4] Lindley L.J. said[5]: "When we look into "the dictionaries as to the meaning of the word 'business,' "I do not think they throw much light upon it. The word means "almost anything which is an occupation, as distinguished from "a pleasure—anything which is an occupation or duty which "requires attention is a business—I do not think we can get "much aid from the dictionary." That case concerned a restrictive covenant. It is clear, therefore, that the word "business" in this advancement clause is wide enough to include any profession, and includes, therefore, the medical profession.

The particular circumstances of the medical profession at the present time require a little examination, because the old practice of buying a share or a partnership has been largely superseded by the provisions of the National Health Service Act, 1946. The

[2] 15 Ch.D. 247, 258, 259.

[3] [1929] 2 Ch. 390; 45 T.L.R. 568.

[4] 27 Ch.D. 71.

[5] Ibid. 88.

present situation is described in the Medical Practitioners' Handbook (issued by the British Medical Association, 1950 ed., at p. 92), where this passage occurs: " As in the past there are " three methods of becoming a principal in general practice: " (1) To put up one's plate. This method, as it has always been, " is both uncertain and expensive. A survey has been made and " published of areas where the number of general practitioners " appears to be inadequate, but it cannot always be assumed that " prospects can be assessed by a study of the doctor-patient ratio " alone. A doctor starting a new practice may apply for a basic " salary of £300 a year to help tide him over the difficult period " of starting. The granting of this salary is vested in the " Executive Council or on appeal to the Minister. There are, " however, other factors to be considered. He must obtain a " house, a car, furniture and equipment for his surgery, and the " outlay may be considerable. Even in advantageous conditions " the outlook facing the ' squatter ' is hard, and he should weigh " the prospects carefully. (2) To take over a practice rendered " vacant by death or retirement. In the past this was effected " by purchase and the responsibility for finding a successor fell " to the executors or the retiring practitioner. Now the position " is changed, and it is the responsibility of the Executive Council " to fill the vacancy, though actual appointments have to be " approved by a central professional committee—the Medical " Practices Committee. Here again housing difficulties may " complicate the picture and it is not surprising that there is very " keen competition for vacancies with large lists or in desirable " surroundings. Where the list is small or of moderate size, it " may be easier to obtain a vacancy, but the successful applicant " faces, though perhaps to a lesser degree, the same difficulties " that beset the squatter. It must always be remembered that " even when there is no delay (and in a death vacancy some " delay is inevitable) a practice suffers to some extent when it " changes hands. (3) To obtain an ' assistantship with view ' to " succession or partnership. This method has the advantage that " it offers security from the outset and it is the method of choice " for those who cannot command the resources to enable them " to wait for their list of patients to grow. Introduction is " effected by the Medical Practices Advisory Bureau or one " of the medical agencies and after a probationary period the " assistant either becomes the ' logical successor ' when his " principal retires, or is made a partner. He must expect to " remain a junior partner in the firm until he has built up his

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"own part of the practice and has thus acquired goodwill in his "own right. During this time he contributes to the work of the "whole practice and in return receives a share which is "unrelated to the actual number of patients on his own list."

The evidence before me shows that it is common to stipulate as a condition of succession that the premises in which the surgery is situate, and where perhaps the previous doctor had lived, should be taken over by the applicant for succession.

It is plain that in every case the chances of an aspiring doctor to succeed to a practice must be affected very largely by his ability to acquire premises in which either there is a surgery for the carrying on of his profession or where he can reside and be available for the purposes of the practice. It is impossible, therefore, to see how the starting of the son in the business (using it in the sense of that of a medical practitioner) can be advanced more certainly than by providing him with the capital to purchase a house, either with or without a surgery for the purposes of his profession.

Accordingly, it is within the powers of the trustees to utilize the quarter of the fund which is available, or such part as they think proper, for the purpose of assisting the son to purchase a house with a view to advancing his prospects in the medical profession, and they are entitled so to apply the money. The house in question may be one in which he resides, and it need not necessarily include a surgery, but it must be a house which is purchased not simply to provide a residence for the son and his wife or family, but one which is purchased by him because he wishes to carry on a practice in a particular locality.

Declaration accordingly.

Solicitors: *Bentleys, Stokes & Lowless.*

I. G. R. M.

In re A DEBTOR (No. 36 OF 1952).

Ex parte THE DEBTOR *v.* J. T. RICHARDSON AND OTHERS.

1953

Mar. 2.

Harman and Danckwerts JJ.

Bankruptcy—Procedure—Appeal—Extension of time—Non-compliance with rules—Mistake—Whether "good cause"—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 108 (2) (*c*)—*Bankruptcy Rules,* 1952 (*S.I.* 1952, *No.* 2113 (*L.*14)), *rr.* 130, 389.

Rule 389 of the Bankruptcy Rules, 1952, provides that the court may "for good cause shown" extend the time appointed by the rules for doing any act.

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A DEBTOR (No. 36 OF 1952), *In re.* *Ex parte* THE DEBTOR *v.* J. T. RICHARDSON.

A firm of solicitors in Manchester, by way of appeal from a receiving order made there, sent a notice of appeal to London to be entered; and had, in purported compliance with rule 130, sent a copy in due time to the registrar of the county court. The notice was not entered in London, as it was incorrect in form. A second notice in proper form was sent to London and entered. The solicitors failed to serve in time a copy of the second notice on the registrar at Manchester as they assumed that the first notice would be entered in London:—

Held, that the mistake of the solicitors was not "good cause" within the meaning of rule 389 for extending the time for service on the registrar, and that the appeal must therefore be dismissed.

In re Muscovitch [1939] Ch. 694; 55 T.L.R. 364; [1939] 1 All E.R. 135 followed.

APPEAL from Manchester county court.

At the hearing of this appeal by a debtor from a receiving order made on him at Manchester county court, counsel for the creditors took a preliminary objection that a copy of the notice of appeal had not been served on the registrar within the time provided by rule 130 of the Bankruptcy Rules, 1952,[1] and that it could not therefore be entertained by the court.

The following statement of facts is relevant to that question alone:

A receiving order was made in Manchester on January 26, 1953. An appeal from that order was first attempted by a notice of appeal dated February 2, 1953, which was sent from Manchester to be entered in London. When the notice arrived in London it was seen to be in the wrong form, because it gave notice that the court would be moved "at the expiration of 14 days or so "soon thereafter as counsel can be heard." That was not in the correct bankruptcy form, in which a bankruptcy day for a return of the notice must be given.

No attempt was made to enter that notice in London, but a new notice was prepared, which was duly entered on February 5. That notice was in the proper form, being properly stamped and accompanied by £20 as security.

The solicitors for the appellant in Manchester had, in the meanwhile, assumed that the notice of February 2 was in the

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[1] Bankruptcy Rules, 1952, r. 130: "Within seven days from the entry "of the appeal a copy of the notice of "appeal shall be sent by the appellant to the registrar of the court "appealed from, who shall enter the "date of receipt on the copy and file "it with the proceedings."

R. 389: "The court may, for good "cause shown, extend or abridge the "time appointed by these rules or "fixed by an order of the court for "doing any act or taking any steps "in any proceedings."

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A DEBTOR (No. 36 OF 1952), *In re.* *Ex parte* THE DEBTOR *v.* J. T. RICHARDSON.

proper form and that it would be entered, and they had sent a copy of that notice on February 3 to the registrar of the county court in order to comply with the rule.

Later it became apparent that there might have been no compliance with rule 130, because a copy of the second notice of appeal, dated February 5, had not been served on the registrar of the county court until February 16, when it was put on the file with the county court stamp, but not within the seven days required by rule 130.

Peter Foster for the creditors. Copy of the notice of appeal was not served on the registrar within the time prescribed by rule 130 of the Bankruptcy Rules, 1952. Failure to comply with the rule invalidates the appeal. Notwithstanding that rule 130 differs materially from rule 132 of the Bankruptcy Rules, 1915, it is submitted that *In re Muscovitch* [2] is still binding on the court. In that case the Court of Appeal held that failure to serve a copy of the notice of appeal "forthwith" as required by rule 132 of the Bankruptcy Rules, 1915, was not a sufficient reason for extending the time to do so under rule 386 (now rule 389). Under the present rule, rule 130, the appellant has seven days in which to serve a copy, instead of being obliged to do so forthwith. It is submitted therefore that there is less reason now to excuse non-compliance with rule 130, and it should be construed as strictly as in *In re Muscovitch.*[2]

P. A. Ferns for the debtor. The reasons in *In re Muscovitch* [2] do not apply here, because anyone searching the files could discover what the position was. Although a copy of the correct notice of appeal had not been served on the registrar in time, there was a copy (although an incorrect one) on the file. In the circumstances no harm could have been done to anyone.

By rule 389 a person has now only to show "good cause" for obtaining an extension of time; the words "special circumstances" have been left out, and it is no longer necessary, as in the earlier cases, to show special circumstances. [He referred to *Gatti* v. *Shoosmith* [3] and *In re Vitoria.*[4]] Good cause is less stringent than special circumstances. Good cause primarily means the reason why a thing was done; here it was because the solicitors in Manchester thought that the first notice of appeal was good, and that service of a copy of that notice was sufficient. It is submitted that that is a "good cause" within the meaning of rule 389.

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[2] [1939] Ch. 694; 55 T.L.R. 364; [1939] 1 All E.R. 135.

[3] [1939] Ch. 841; 55 T.L.R. 1023; [1939] 3 All E.R. 916.

[4] [1894] 1 Q.B. 259; 10 T.L.R. 165.

HARMAN J. This is a preliminary objection taken on appeal under the Bankruptcy Rules, 1952, and it is a matter of some technicality. [His Lordship stated the facts as set out above and continued:] The order in rule 130 for service on the registrar is mandatory and has not been complied with, and unless in some way or another, therefore, the failure can be excused, the appeal cannot proceed. The fundamental provision is in section 108 of the Bankruptcy Act, 1914, subsection (2) (*c*) of which is in these terms: "No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal." It is apparent, therefore, that the appeal must be within the rules if it is to be entertained at all; otherwise the court has no jurisdiction.

It was said that although the service of the copy on the registrar was out of time, the court is enabled to waive that or to overlook it by extending the time under rule 389 of the Bankruptcy Rules, 1952. [His Lordship read rule 389 and continued:] It has been rightly pointed out that it is difficult to see that anybody has been harmed by anything that has been done. There has been a notice, albeit an incorrect one, on the registrar's file ever since February 3, 1953, anterior in time to the entry of the present notice of appeal, notifying the public, or anybody who wished to search, that an appeal was pending. I cannot imagine, therefore, that any harm can have ensued from this irregularity—I call it that without prejudice—but nevertheless there is authority binding on us that it is necessary to comply with that rule unless there is good reason for absolving the appellant from it.

The matter has been before the Court of Appeal in recent years in *In re Muscovitch*,[1] where Sir Wilfrid Greene M.R. found himself reluctantly constrained to hold that the objection of non-compliance with the rule was a good one. That decision, however, was under the Bankruptcy Rules, 1915, which, in significant respects, differ from the present rules. The point with which the court was primarily concerned turned on the word "forthwith" in rule 132 of the Rules of 1915. That point does not now arise, for in deference to the court's suggestion the period of seven days has been substituted in the Rules of 1952. Apart from this point rule 386 of the Bankruptcy Rules, 1915, was in these terms: "The court may, under special circumstances and "for good cause shown, extend or abridge the time appointed . . ."

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[1] [1939] Ch. 694.

It cannot be without significance that the new rule has omitted the words "under special circumstances," so that an appellant now may have his time extended without proving special circumstances, provided that he can show that there was good cause. It is a little difficult to think of a good cause which would not also operate as a "special circumstance"; but I must suppose that the two things are different, and therefore the question that we have here to decide is whether there is "good "cause shown."

The good cause suggested is a mistake made by the solicitors in Manchester, who thought that the first notice of appeal which they sent to London would be filed, and omitted to find out that that had not been filed, so that the notice served on the registrar was not a copy of any appeal which had been entered.

If this had been the case of extending the time of appealing from the High Court in its ordinary jurisdiction to the Court of Appeal it is clear from the decision of the Court of Appeal in *Gatti* v. *Shoosmith* [2] that the mistake of a legal adviser may be a sufficient reason. Sir Wilfrid Greene M.R. pointed out in that case [3] that a recent alteration in the rule had set the court free from the fetters formerly circumscribing its discretion and that the discretion was therefore unlimited. I should have expected the Bankruptcy Rules to follow suit, but they have only gone halfway. The Bankruptcy Court's discretion, though freed from "special circumstances," is still fettered by "good cause shown." I cannot think that a mere blunder amounts to so much.

That being so, I am unable (though I do not relish coming to this conclusion) to see that we can extend the time. I think that this objection must be upheld.

DANCKWERTS J. I agree, and wish to say that I must not be taken as agreeing that no harm can have been done to anybody. I am not quite sure that I appreciate exactly the object of the notice being given to the registrar in a particular manner; but if the object is to enable the public to ascertain what is being done, a wrong form of notice referring to a wrong date might well mislead, and it seems to me, therefore, that it does not necessarily follow that the irregularity did no harm whatever.

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[2] [1939] Ch. 841.

[3] Ibid. 845, 846.

I agree that the objection succeeds and that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *R. A. Rotherham & Co., for Pearsons & Ward, York; L. Bingham & Co., for James Chapman & Co., Manchester.*

I. G. R. M.

PRIDE OF DERBY AND DERBYSHIRE ANGLING ASSOCIATION LD. AND ANOTHER *v.* BRITISH CELANESE LD. AND OTHERS.

[1951 P. 1260.]

C. A.

1952 Dec. 2, 3, 4, 8, 9, 10, 12, 15.

Evershed M.R., Denning and Romer L.JJ.

River pollution—Nuisance—Injury to fishery—Pollution by discharge of sewage and heated effluents—Action by riparian owners—Statutory defences—Nuisance alleged to result from non-feasance not misfeasance of local authority—Whether injunction should be granted against local authority—Form of injunction—Derby Corporation Act, 1901 (1 *Edw.* 7, *c. cclxvii*), *ss.* 109, 113—*Derbyshire and Nottinghamshire Electric Power Act,* 1929 (19 & 20 *Geo.* 5, *c. lxxxvi*), *s.* 37—*Electricity Act,* 1947 (10 & 11 *Geo.* 6, *c.* 54), *s.* 57.

The first plaintiffs were the owners of a fishery in the Rivers Trent and Derwent, and the second plaintiff was the riparian owner of a considerable stretch of both rivers. In this action, the plaintiffs claimed an injunction to restrain the pollution of the rivers and damages. There were three effective defendants to the action. It was alleged that the first defendant, a commercial company, caused pollution by pouring injurious effluents into the River Derwent and by returning water to the river at so high a temperature as to be injurious to fish; that the second defendants, the Derby Corporation, were polluting the rivers by pumping from their sewerage works insufficiently treated sewage into the Derwent; and that the third defendants, the British Electricity Authority, polluted it by discharging heated effluent. The plaintiffs based their action on nuisance; negligence was not alleged. The first defendants agreed to submit to an injunction. Harman J. found that the plaintiffs had established a good cause of action against the second and third defendants and granted an injunction restraining them from discharging effluent into the River Derwent so as generally to alter the quality (including the temperature) of the water of the river to the injury of the plaintiffs or so as to interfere with the plaintiffs' rights of fishery. The operation of the injunction was suspended until April 30, 1954.

The Derby Corporation appealed. On the appeal it was not disputed that their operations resulted in pollution, but the corporation contended that by the Derby Corporation Act, 1901, they were charged with the duty of providing a sewerage system for the County Borough of Derby, and that, in accordance with their statutory powers, they had constructed a sewerage system which, at the time when it was completed, did not cause pollution, and that accordingly they were not liable for the present pollution which had resulted solely from the increase in the population of Derby causing the system to become inadequate; the damage to the plaintiffs was the result of non-feasance not of misfeasance. The corporation alleged that the plaintiffs' only remedy was by application to the Minister of Local Government and Planning under the Public Health Acts. Secondly, the corporation alleged that, if the plaintiffs had a cause of action, no injunction should be granted.

The British Electricity Authority appealed against the form of the injunction granted against them.

Held, first, that the proposition that a local authority was not liable for non-feasance in regard to highways rested upon historical grounds and might lead to error or confusion if it were assumed that a similar proposition could necessarily be applied to sewers and drains. As regarded sewers and drains, it was necessary to keep in mind the possibility of two distinct causes of action: namely, (1) nuisance and (2) negligence. As regarded negligence, it might be that non-feasance, in the sense of failing to perform some positive statutory duty, did not give rise to a cause of action for negligence against a local authority in respect of its sewerage system. In regard to nuisance, however, the question of non-feasance as distinct from misfeasance had no real relevance. As regarded nuisance, the question was whether the thing complained of as a nuisance was expressly or impliedly authorized by the statute in accordance with which the works were constructed or, alternatively, whether the nuisance complained of was the inevitable consequence of that which the Act both authorized and contemplated. On that question, whether the thing complained of was non-feasance or misfeasance was beside the point. On the true construction of the relevant statutes, the Derby Corporation had no statutory defence to the action for nuisance by discharging untreated sewage into the River Derwent.

Held, secondly, that if a plaintiff proved that his proprietary rights had been wrongfully interfered with by a defendant and that the defendant intended to continue his wrongdoing, the plaintiff was prima facie entitled to an injunction, and that he would be deprived of his remedy only in special circumstances, including the circumstance that damages were an adequate remedy for the wrong which he had suffered. In this case damages would be a wholly inadequate remedy. The court would not impose on a local authority, or on anyone else, an obligation to do something which was impossible or which could not be enforced or which was unlawful. The injunction should be granted subject to suspension. The corporation having been proved to be wrongdoers, if they wanted a further suspension they would have to satisfy the court that justice required that it should be granted.

Held, thirdly, that the injunction against the British Electricity Authority should be limited to prohibiting the authority from returning water to the river in such a condition as to cause injury to fish.

Glossop v. *Heston and Isleworth Local Board* (1879) 12 Ch.D. 102 and *Attorney-General* v. *Dorking Union Guardians* (1882) 20 Ch.D. 595 considered and distinguished.

Robinson v. *Workington Corporation* [1897] 1 Q.B. 619 (13 T.L.R. 148) and *Hesketh* v. *Birmingham Corporation* [1924] 1 K.B. 260 considered.

The question whether the rule in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330 applies in all its strictness to local authorities considered but not decided.

Decision of Harman J. [1952] W.N. 227; [1952] 1 T.L.R. 1013; [1952] 1 All E.R. 1326 affirmed.

Appeal from Harman J.

The following statement of facts is taken from the judgment of Evershed M.R.: This was an action in respect of pollution of the River Derwent east of Borrowash Bridge, and up to the point of its confluence with the River Trent. The claim also extended to some pollution of the River Trent itself.

There were two plaintiffs in the action, first, The Pride of Derby and Derbyshire Angling Association Ld., who were the owners and occupiers of a fishery in the Rivers Trent and Derwent and who were concerned with the state of the fishing in the stretch of the river in question—and second, the Earl of Harrington, who was a riparian owner of a considerable part of both rivers. As such riparian owner, his common law rights in certain respects were more extensive than the rights of the first plaintiffs, a point which was relevant to the appeal of the British Electricity Authority.

There were originally four defendants to the action: British Celanese Ld., the mayor, aldermen and burgesses of the County Borough of Derby, the British Electricity Authority (East Midlands Division), and Midland Tar Distillers Ld. The last-named defendants had discontinued operations in this neighbourhood at an early stage, and the proceedings were accordingly stayed against them. The action proceeded to trial against the first three defendants.

The action was concerned with the River Derwent from the point where it left Derby at Long Bridge until a point some few miles after its confluence with the River Trent. After a mile or more of its course, the river reached a point called Raynesway Bridge, and, on the finding of Harman J., at that point the waters of the Derwent were unpolluted. The river then passed through an area which was the property of the Derby Corporation. The course of the river was that it took a loop to the north; but there had been constructed across the base of the loop a channel which enabled the water to go direct across the loop's base. At the bottom south-eastern corner of the loop there was a storm water outfall, which in this case had been called outfall "A." The method of sewerage and drainage adopted by the Derby Corporation was one which combined both the storm and the foul water in a single sewer, and at outfall "A" there was provision so that in the event of flood conditions, the effluent—that is, storm water with untreated sewage—might be discharged, so far as was necessary to relieve pressure, direct into the Derwent; but save so far as it was so discharged, the contents of the sewer were carried northward through an artificial sewer to a point at the top of the loop where there was another and similar outfall. To the north again of that point were the sewage disposal works of the corporation, on their own land, consisting of filters, tanks and the like. From the sewage disposal works there was a pipe or drain which carried the effluent into the River Derwent at a point approximately a mile further downstream from the second storm water outfall. Though in the action complaints had been made in regard to the storm water outfall, for the purposes of this appeal it had been conceded that the complaint against the corporation related (and related exclusively) to the effluent which was discharged from the sewage disposal works through the pipe or drain into the Derwent.

Meanwhile the river itself proceeded on its course, and next passed through or adjacent to the land of the first defendants, British Celanese Ld. In their case there were a number of points of effluent discharge, seven in all. British Celanese Ld. were regarded as the principal offenders, and there had been no appeal on their part. The pollution which they contributed was both in regard to the matter in suspense and otherwise in the effluent, and in regard to temperature. In respect of Derby Corporation, no question of temperature arose, the pollution was derived from the presence in the effluent of filth and sewage matter of various kinds.

To the south, or on the right bank of the River Derwent as it passed the territory of British Celanese Ld., and continuing for some distance further to the east, lay more land of the Derby Corporation. Finally, and further still to the east, but before Borrowash Bridge, was the land of the British Electricity Authority. Their power station was erected on a relatively small piece of land lying to the west, or on the left bank of the river, where it again turned north after passing the Derby Corporation's land. The water of the river was used by the Electricity Authority for the purposes of their power station, and in their case the pollution complained of related exclusively to temperature. In the year 1929, the Power Company, the predecessors-in-title of the British Electricity Authority, acquired further land to the east of the power station itself on which they erected cooling towers. Those cooling towers were erected so as to enable the authority to use the water twice which they had abstracted from the river; but the presence of those towers did not in practice affect the temperature at which water, after finally being used by the power station, was again discharged into the River Derwent. After suffering those varied experiences, the waters of the river arrived at Borrowash Bridge, and from that point eastwards were the interests, riparian and other, of the two plaintiffs in the action.

The plaintiffs claimed against all the defendants an injunction restraining them from permitting any effluent to pass from their respective premises into the River Derwent or the River Trent so as to pollute (either by itself or in combination with any effluent discharged by one or more of the other defendants) the waters of the River Derwent or the River Trent when they flowed past or over the plaintiffs' premises or from altering the quality of the water detrimentally to the plaintiffs or from interfering with the enjoyment of the plaintiffs' rights of fishery. The plaintiffs claimed against British Celanese Ld. and the British Electricity Authority an injunction restraining them from causing any effluent to pass from their respective premises into the River Derwent so as perceptibly to alter the temperature of its waters.

The plaintiffs founded their case on nuisance; they did not allege negligence against any of the defendants.

Harman J. concluded that the material stretch of the river was very gravely polluted, and was in a state such as extinguished therein all fish life, and also all fish food. He also concluded that although the first defendants, British Celanese Ld., were the most serious offenders, the second and third defendants substantially contributed to the pollution, and accordingly that all three defendants were liable to the plaintiffs. The judge rejected the proposition that since all defendants were individually polluting, none could be made liable. There was no appeal in respect of those matters.

As to the Derby Corporation, the judge said: "I cannot " doubt, having heard the evidence, that the solids put into the " stream by the corporation are a substantial contribution to the " state of things existing in the plaintiffs' waters." As to the Electricity Authority, he said: "I find, therefore, that the Power " Company's activities in the present state of the river sensibly " contribute to the harm that is being done to the plaintiffs. " Moreover, I accept the evidence of Dr. Steven, another scientist called by the plaintiffs, that even if this were a clean " stream, these activities, though perhaps not harmful to the " plaintiffs in the winter months, would be harmful in the " summer when the natural temperatures are higher."

Finally, he said: " In the upshot, therefore, I hold that the " plaintiffs have established a good cause of action against both " these defendants, as they admittedly have against the first " defendants."

Harman J. made an order in the following terms: " This " court doth order that each of them the defendants British " Celanese Ld. (hereinafter called the defendant company), the " second defendants the Mayor, Aldermen and Burgesses of the " County Borough of Derby (hereinafter called the defendant corporation) and the third defendants British Electricity Authority " (hereinafter called the defendant authority) (which defendants " are in this order collectively referred to as the said defendants) " be perpetually restrained from causing or permitting (whether " by their respective servants or agents or workmen or otherwise " howsoever) any effluent to flow or pass from their respective " premises in the County of Derby in the pleadings mentioned " into the River Derwent

" (a) so as sensibly to alter (either by itself or in combination " with any effluent discharged into the said river by any of the " others of the said defendants or any other person) the quality " (including the temperature) of the waters of the said River " Derwent or the waters of the River Trent where the same flow " past or over any part of the plaintiffs' premises as mentioned and " defined in the statement of claim to the injury of the plaintiffs " or either of them or their respective sequels in title or of any "person or persons claiming under or through them or any of "them in respect of the plaintiffs' said premises or any part "thereof, or

"(b) so as to interfere (either by itself or in combination as "aforesaid) with the enjoyment by the plaintiffs or either of "them or their respective sequels in title or any person or persons "claiming under or through them or any of them of the right of "fishing in any part of the plaintiffs' waters as mentioned and "defined in the statement of claim."

Then, after referring to certain undertakings, it was ordered: "That the operation of the foregoing injunction be suspended "until April 30, 1954," that was, approximately two years from the date of the order.

The judge ordered an inquiry as to damages. The order proceeded: "And the said defendants by their counsel consenting "to this apportionment it is ordered that the damages which "upon the taking of such inquiry shall be certified as aforesaid "be paid by the said defendants in the following proportions, "namely: the defendant company one half, the defendant corporation one quarter, the defendant authority one quarter." As each of the three remaining defendants were substantial, the plaintiffs were content with the result so long as neither of the appeals succeeded.

The Derby Corporation (hereinafter called "the corporation") appealed against Harman J.'s order, contending that, although the corporation admitted causing pollution, the plaintiffs were not entitled to any relief against the corporation. The British Electricity Authority (hereinafter called "the authority") appealed to the extent of asking to have the terms of the injunction made against it varied so that the injunction granted against the authority should not enure to the plaintiffs against the authority so long as the authority should comply with the proviso to section 37 (1) of the Derbyshire and Nottinghamshire Electric Power Act, 1929[1]; that was to say, should return water abstracted from the River Derwent pursuant to section 37 (1) (except that unavoidably lost by evaporation) in such a condition as not to cause (in the waters of the river when they flowed below and after receiving such effluent) injury to fish.

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[1] Derbyshire and Nottinghamshire Electric Power Act, 1929, s. 37 (1): "The company may abstract water "from the River Derwent and may "utilize the same for condensing and "other purposes of the generating "station. . . . Provided that all "water so abstracted except that un- "avoidably lost by evaporation shall "be returned to the river . . . in such "a condition as not to cause injury "to fish."

C. A.
1952

Pride of Derby and Derbyshire Angling Association Ld. v. British Celanese Ld.

The plaintiffs appealed against that part of Harman J.'s order which apportioned the liability to pay damages between the defendants. The appeal only became material in the event of Harman J.'s decision being reversed as against the corporation.

The appeal of the corporation having been dismissed, the plaintiffs' appeal was not proceeded with.

Sir Andrew Clark Q.C. and *G. T. Hesketh* for Derby Corporation. The plaintiffs' real ground of complaint here is that the sewerage works are insufficient to cope with the sewage of Derby which has increased in size greatly since the works were constructed. The finding of Harman J. that the corporation has materially contributed to the pollution of the Derwent is not disputed. The plaintiffs, however, do not allege that pollution was caused by the corporation's negligence. It would be negligence not to repair the sewerage system but it is not negligence not to construct a new system to deal with the increased sewage.

It is submitted, first, that the sewerage system having been originally constructed in accordance with the provisions of section 109 of the Derby Corporation Act, 1901, and since so maintained, that Act affords a defence to this action: *Metropolitan Asylum District* v. *Hill.*[2] Secondly, that the sewerage works having been so constructed in the first instance so as not to result in a nuisance, the authority is not liable if, owing to a change of circumstance not within its control, a nuisance results. The present nuisance results from non-feasance for which the corporation is not liable.

Dixon v. *Metropolitan Board of Works*[3] shows that the principle of *Rylands* v. *Fletcher*[4] has no application to such a case as this. In that case something dangerous brought on to the land escaped and caused damage to others; but when the matter in question is brought on to the land by a local authority in exercise of statutory powers, while carrying out a public duty, the authority is only liable for injury resulting if there has been negligence. The statute puts the corporation in the same position as if sewage were naturally there.

The corporation did not bring the sewage on to the land except by statutory order and the sewage had to be discharged and the outflow has only polluted the river by reason of the excess of sewage brought into the sewage works as the result of new building over which the corporation had no control. [They referred to sections 107 to 110 and section 113 of the Derby Corporation Act, 1901.]

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[2] (1881) 6 App.Cas. 193.

[3] (1881) 7 Q.B.D. 418.

[4] (1868) L.R. 3 H.L. 330.

When once it is shown that the works were authorized by the local Act and carried out satisfactorily by the local authority, there can be no liability if later, through circumstances outside the control of the local authority, damage results. That is a case of non-feasance and not misfeasance and the only remedy for anyone aggrieved is to proceed under the Public Health Act: *Glossop* v. *Heston and Isleworth Local Board* [5]; *Attorney-General* v. *Dorking Union Guardians* [6]; and *Robinson* v. *Workington Corporation.*[7]

The liability of a local authority is different in the case where a nuisance results at the time when the works were constructed. The authorities show that an injunction will not be granted to close a sewer where the inhabitants have a statutory right to send sewage down the sewers. An injunction should not be used as, in effect, a mandamus to force a local authority to construct new sewers. *Hesketh* v. *Birmingham Corporation* [8] shows that if the works, when completed in accordance with a statutory authority, do not cause a nuisance, should a nuisance subsequently result without any default on the part of the local authority they will not be liable. [They referred to *Jones* v. *Llanrwst Urban District Council.*[9]] In *Haigh* v. *Deudraeth Rural District Council,*[10] *Jones* v. *Llanrwst Urban District Council* [11] was wrongly followed, for the principle of *Glossop* v. *Heston and Isleworth Local Board* [12] applied there.

Blundy, Clark & Co. Ld. v. *London and North Eastern Railway Co.* [13] shows that a local authority is in a different position from railway and engineering companies: see also *Emsley* v. *North Eastern Railway Co.*[14] The fact that here there was no negligence on the part of the local body, and in fact none is alleged, relieves the corporation from any liability. The sewerage works were properly constructed and were effective when made under the Act of 1901 and caused no nuisance. It follows that the only possible ground for complaint is for failure to enlarge the works as the dwelling-houses increased. It is submitted that on the true construction of section 109 of the Derby Corporation

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[5] (1879) 12 Ch.D. 102.
[6] (1882) 20 Ch.D. 595.
[7] [1897] 1 Q.B. 619.
[8] [1924] 1 K.B. 260.
[9] [1911] 1 Ch. 393.
[10] [1945] 2 All E.R. 661.
[11] [1911] 1 Ch. 393.
[12] 12 Ch.D. 102.
[13] [1931] 2 K.B. 334.
[14] [1896] 1 Ch. 418.

Act, 1901, the corporation is not liable for any pollution resulting from the sewerage works.

Lastly, if section 109 of the Act of 1901 is construed against the corporation, it is submitted that the only remedy is under the Act, and a claim for an injunction, which, in effect, is a mandatory injunction, will not lie. An injunction should not be granted against the corporation in respect of a matter controlled by the Minister under the Public Health Act, 1936. Unless the Minister were to allow the Derby Corporation to enlarge the sewerage works, it would be illegal for the corporation to do so. It follows that an injunction should not be granted even though it is suspended for two years, as it was in the court below. The court will never grant an injunction to compel something to be done which the defendant is not free to do. Compliance with the injunction restraining the corporation from causing pollution could only be effective, if new works were not allowed to be constructed, by closing the existing sewerage works. Damages here are sufficient remedy and there is no reason to suppose that the work will in fact not be done by the corporation with the least possible delay.

Charles Russell, Q.C., G. H. Newsom and *J. A. Gibson* for the plaintiffs. The riparian waters were here polluted in contravention of the plaintiffs' common law rights. This was done by the Derby Corporation by discharging filth into the river from the sewerage works in the course of draining their district. The corporation can only avoid liability for their conduct in these circumstances by showing that there is statutory authority which deprives the plaintiffs absolutely of their common law rights or, alternatively, limits them by restricting their remedy to statutory compensation. There is, it is contended, no such authority. The Derby Corporation Act, 1901, does not confer power on the corporation to commit a nuisance, but expressly prohibits such conduct.

It appears from the decisions in *Glossop* v. *Heston and Isleworth Local Board* [15] and *Attorney-General* v. *Dorking Union Guardians* [16] that where a local authority inherits a sewerage system from a previous owner and does nothing, and the system results in a nuisance, the authority is not liable. Those cases are distinguishable from this. Here the corporation constructed the sewerage system. The decision in *Hesketh* v. *Birmingham Corporation* [17] is distinguishable. There both negligence and

[15] 12 Ch.D. 102.

[16] 20 Ch.D. 595.

[17] [1924] 1 K.B. 260.

nuisance were alleged and it was held that non-feasance in the sense of not exercising statutory powers was not negligence. In that case non-feasance was only relevant in connexion with the claim based on negligence. Here the plaintiffs do not rely on any failure to exercise the corporation's statutory powers. The plaintiffs' claim is based on nuisance, for which they say that there is no statutory justification. The Public Health Acts are not a defence to an action for nuisance.

It is submitted that the decisions on the liability of highway authorities for non-feasance are of no assistance when considering the position of an authority in connexion with sewage: *Simon* v. *Islington Borough Council.*[18]

This case is distinguishable from the *Glossop* case.[19] Once an authority have constructed sewerage works themselves in accordance with their statutory powers, they cannot disclaim liability when it fails to function properly owing to increased user. Here the corporation are not merely allowing sewage to pass into the river, but by their sewerage works they are pumping it into the river. There is nothing in the Derby Corporation Act, 1901, which authorizes the pumping of untreated sewage into the river. [They referred to *Robinson* v. *Workington Corporation.*[20]]

The second question is whether the plaintiffs are entitled to an injunction or whether their remedy is limited to damages. It is submitted the proper remedy is to grant an injunction suspended for a period. At the end of that period the plaintiffs are entitled to have the onus thrown on to the corporation of showing that it has not been possible to abate the nuisance. [They referred to *Attorney-General* v. *Birmingham Borough Council*[21] and *Attorney-General* v. *Colney Hatch Lunatic Asylum.*[22]] The authorities show that the rights of a plaintiff are best protected in a case such as this by an injunction. There is no ground for departing from the normal practice of the court. The corporation's appeal should be dismissed.

Sir Andrew Clark Q.C. in reply. If the plaintiffs' contention that on the true construction of the Act of 1901 the corporation must prevent its sewerage works at any time after their construction becoming a nuisance is accepted there is no answer to the action. But it is submitted that an injunction should not be granted. The court has jurisdiction to grant damages in lieu of an injunction, and that is the proper remedy here: *Shelfer* v. *City of London Electric Lighting Co.*[23]

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[18] [1943] K.B. 188.

[19] 12 Ch.D. 102.

[20] [1897] 1 Q.B. 619.

[21] (1858) 4 K. & J. 528.

[22] (1868) L.R. 4 Ch. 146.

The court next heard the appeal of the British Electricity Authority.

Henry Salt Q.C., *Harold Willis Q.C.* and *S. I. Levy* for the British Electricity Authority. It is submitted that having regard to the statutory powers conferred on the predecessors-in-title of the authority by section 37 (1) of the Derbyshire and Nottinghamshire Electric Power Act, 1929, all that the plaintiffs can require is that the authority's effluent shall be returned to the river at such a temperature that merged with the waters of the river it shall not be injurious to fish, and the injunction should be so limited.

Charles Russell Q.C. for the plaintiffs. It is submitted that what the authority is doing is asking the court to construe the ambit of the statutory powers conferred by the Act of 1929 and to hold that the riparian owner has no rights if there is no injury to fish from the authority's operations. It is submitted that so to construe the Act in these proceedings would be wrong. The plaintiffs do not object to the injunction being limited to not causing injury to fish, but the authority must not be able to claim any prescriptive or further rights against the riparian owner.

H. F. J. Teague for British Celanese took no part in the argument.

EVERSHED M.R., after stating the facts, continued:—I come to the first appeal, that of the corporation. That appeal raises two points, one being of a secondary character, and arising only if they fail on the first. Their first and main contention is of this nature: it is said that they are a local authority charged by legislation (in their case, special legislation) with the duty of providing a sewerage system for the county borough of Derby. They say next that the present sewerage system, including the sewage disposal works, was originally constructed by them strictly in accordance with, and as contemplated by, their special legislation, namely, the Derby Corporation Act, 1901, and that at the time when they were first constructed those works were effective to deal with the sewage of Derby without polluting the River Derwent. Next they say that when the sewerage works

[23] [1895] 1 Ch. 287.

were enlarged, pursuant to and as contemplated by the Derby Corporation Act, 1930, they were again, after the work had been done, effective to deal with all the sewage of Derby without polluting the River Derwent. Lastly, it is said that at no time has it been shown that the corporation has been guilty of any fault, such, for example, as failure to keep their system in a proper state of repair; that the pollution is the result of the fact that the system, which had become inadequate before 1930 through (and solely through) the increase of the population of Derby, has again become inadequate from similar causes, those causes being wholly beyond the control of the corporation.

Upon those premises, the corporation say that the plaintiffs have no cause of action against them. The plaintiffs' remedy, it is said, is solely by way of application to the Minister of Housing and Local Government under the Public Health Acts, calling upon him to take, if he thinks fit, such steps as may be required to compel the corporation once more to enlarge their sewerage system. At most, they say, the remedy of the plaintiffs is to obtain under the Acts compensation as therein provided for the damage that they have suffered.

The arguments were put in this form by Sir Andrew Clark in opening the case. Once it is established, he said, that the work, being work of a local authority duly authorized by Act of Parliament, was completed in accordance with the Act of Parliament, and at the time it was completed was satisfactory, and in accordance with the Act, then if at a later date, owing to circumstances beyond the control of the local authority (and in the absence of any negligence on the part of the local authority) the system so functions as to cause a nuisance, that is a mere non-feasance, and the only remedy of anyone damaged is under the Public Health Acts. There is no dispute about the premises as I have stated them. The question is as to the validity of the conclusion.

To state at once the secondary argument of the corporation, it was then further argued that if there was, or is, a cause of action in the plaintiffs at all, the judge ought not to have granted any injunction, but should have left the plaintiffs to their remedy in damages. That argument was based primarily on the peculiar difficulties of the corporation having regard, among other things, to the application of the Defence (General) Regulations, 1939, reg. 56A, to the necessity of licences for building operations, and also to the fact that any money required for undertaking works of reconstructing the sewerage system could be borrowed only with the consent of the Minister.

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But Sir Andrew Clark went further. He went the length of arguing, if it were necessary, that no injunction ought ever to be granted against a local authority in any circumstances, at any rate in regard to its sewerage works. He argued further that an injunction, though negative in form, being mandatory in substance was a means of bringing, as I understood him, some sort of improper pressure to bear upon the Minister in the exercise of his duties in granting licences and so forth, and further was a wrongful interference with the corporation's own right to deal with their own problems in such order as they thought fit.

It is, of course, open to the corporation to submit all or any of these propositions, including the most extreme of them, to the court. But it is also open to the plaintiffs, whose rights, as it has been proved, have been seriously damaged, to come to Her Majesty's courts, and to ask for (and, if possible, obtain) redress for those wrongs. In the circumstances, it startled me that the corporation thought fit through their counsel to submit that it was not " sensible "—that was the word used, according to my note—of the plaintiffs to sue the corporation in these courts; and not only that, but to make the extravagant suggestion that the action was one brought by the solicitors for the plaintiffs for the sole purpose of making for themselves a profit in the way of costs. It is only fair to Sir Andrew Clark to say that he withdrew unreservedly that last imputation; but the fact that those charges were made on the part of the corporation cannot, I think, be forgotten, particularly in considering, from the point of view of costs, the alternative suggestions which they have put before the court as to the form of the order proper to be made.

At this stage, I can dispose summarily of certain of the submissions that the corporation have made, including the submission that the injunction would operate in some way to bring pressure upon the Minister of Local Government and Planning. For my part, I have no doubt whatever that the Minister will perform his duty of granting licences and priorities in respect of licences with impartiality, and with the single aim of faithfully performing his duty to the national benefit. The existence of the injunction will no doubt make clear to him that the pollution of the river by the corporation is serious (as the corporation now admit that it is) and that ameliorative measures in respect thereof are urgent, a view which will be supported by the borough engineer of the corporation itself, who has, I understand, for years so advised the corporation. As for the point that the injunction constitutes, as it were, an invasion of the sovereign authority of the corporation to decide as they choose what operations to perform and when, I say no more than that, in my judgment, such a submission is without warrant or foundation.

Now it is clear that if a public authority so exercises any of its functions as to cause a private nuisance to any person, the authority is liable in consequence to be sued in these courts, as any other subject is liable, unless it can rely upon some statute as providing, by express language or necessary or proper inference, a defence to such an action. So much appears, for example, from *Metropolitan Asylum District* v. *Hill.*[2] In the present case, the corporation have set up the Derby Corporation Act, 1901, as their defence, and Sir Andrew Clark has admitted that the later Derby Corporation Act, 1930, for present purposes, adds nothing to what may be extracted from the Act of 1901.

The first and principal question, therefore, is of the construction and effect of the Derby Corporation Act, 1901. That Act made provision in Part V, sections 105 to 117, for the " Sewerage " and Sewage Disposal Works " with which we are concerned. Section 105 provided that: " The corporation may appropriate " and utilize for the treatment and disposal of sewage the lands " described in the Fifth Schedule to this Act."

Section 106 reads thus: " Subject to the provisions of this " Act the corporation may make and maintain in and according " to the lines situations and levels shown on the deposited plans " and sections the sewerage works hereinafter described together " with all necessary and proper intakes outfalls overflows sewers " drains channels weirs sluices junctions syphons engines pumps " boilers machinery culverts shafts tanks manholes filters contact " beds works buildings and conveniences connected therewith " and may enter upon take and use such of the lands delineated " upon the deposited plans and described in the deposited books " of reference as may be required for that purpose." It is convenient at this point to note that, although that section is in terms permissive, I assume in Sir Andrew Clark's favour (and I think that the assumption is well founded) that the effect of sections 112 and 117 is that those works were not only permissive, but were in fact directed, and certainly contemplated. There then follows in section 106 a short description of the various works which were to be undertaken, a total altogether of 23. No. 1 relates to outfall "A," and the works particularly connected with the sewage disposal works are Nos. 15, 16, 17, 18 and 19.

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[2] 6 App.Cas. 193.

There then follows in the Act a number of sections, familiar in legislation of this kind, for the protection of various bodies of persons or corporations. Thus, section 107, according to the sidenote, is: "For protection of the Midland Railway Company "as to Sewage Works." Section 108, again according to the sidenote, is: "For protection of Derbyshire County Council." The most important section for our purposes is section 109, which has the sidenote: "For protection of the Parish of Spondon," and provides: "(1) The sewage disposal works constructed on "the lands acquired under the powers of this Act shall at all "times hereafter be conducted so that the same shall not be a "nuisance and in particular the corporation shall not allow any "noxious or offensive effluvia to escape therefrom or do or permit "or suffer any other act which shall be a nuisance or injurious "to the health or reasonable comfort of the inhabitants of "Spondon and this Act shall not exempt or be deemed to "exempt the corporation from any liability for any nuisance "arising from such sewage disposal works or from any proceed"ings which might but for this Act be taken against them under "the provisions of the Public Health Acts or otherwise and the "County Council may take any proceedings they may think fit "for the purpose of enforcing or giving effect to these provisions.

"(2) The corporation shall within six months after they have "acquired under the provisions of this Act the lands described "in the Fifth Schedule hereto reserve out of the same a strip "of land ten yards in width along the northern boundary of such "lands and shall forthwith plant the said strip with trees and "evergreen shrubs so as to form an effectual screen in front "of the rest of the lands and shall for ever afterwards maintain "the same so planted. The Rural District Council"—which must mean the Rural District Council of Spondon—"may take "such proceedings as they think fit for the purpose of enforcing "or giving effect to the provisions of this subsection."

Section 110 is described in the marginal note as: "For "protection of Great Northern Railway Company as to Sewage "Works." Before passing from that group of sections, it is to be noted that, except in the case of section 109, each of the other sections begins, in effect, by specifically stating that the provisions are for the protection of the named persons or corporations. In the case of section 107, it is not quite so clear. The language begins: " In executing the works by this part of " this Act authorized where the same will affect any railway " etc. " of the Midland Railway Company . . . the following pro- " visions shall unless with the previous consent of the Midland " Railway Company . . . apply and have effect "; but section 108 opens: " For the protection of the county council," and similarly section 110 opens: " The following provisions for the protection " of Great Northern Railway Company."

Section 111 is a power to deviate, which I can pass over, and section 112 I have already referred to. Section 113 is of some importance, and is as follows: " The corporation may divert all " brooks streams and waters which can or may be intercepted or " taken by the sewers authorized by this part of this Act and the " corporation may by means of such sewers discharge or permit " to flow into the River Derwent the waters so intercepted or " taken together with any effluent and other waters passing over " or through or discharged from the sewage disposal works of " the corporation. Provided that nothing in this part of this " Act contained shall authorize the corporation to construct any " works or do any other thing in contravention of the Rivers " Pollution Prevention Act, 1876, or section 17 of the Public " Health Act, 1875. Provided also that the corporation shall " pay compensation to any person for any damage sustained by " reason of the exercise of the powers of this section the amount " of such compensation failing agreement to be settled by " arbitration under the Arbitration Act, 1889."

The only other reference I need make to the Act is to subsection (15) of section 115, a section which contains divers provisions as to the main drainage area. The passage in subsection (15) which I want to mention is the proviso at the end, which is in these terms: " Provided that the corporation shall " keep the local authorities respectively indemnified against any " breach of the Rivers Pollution Prevention Acts, 1876 and 1893, " or the general law which may be committed by the corporation " in reference to the treatment and disposal by the corporation " of the sewage of the local authorities respectively and not " arising through any neglect or default on the part of the local " authorities respectively."

The first matter to consider is the effect of the important section 109. It was argued on behalf of the corporation that this section was (and must be construed as being) solely for the protection of the parish of Spondon. Alternatively, Sir Andrew

Clark submitted that it was a further section for the protection of the Derbyshire County Council. For the proposition that it was exclusively for the protection of the parish of Spondon, Sir Andrew relied, naturally enough, upon the marginal note, which so states. I assume in this case that it is permissible to have regard to marginal notes, for it appears that the marginal notes did form part of the Act when passed by Parliament. If, therefore, there should arise an ambiguity in the meaning of the section, it would be permissible to see whether the marginal note offered any solution of the ambiguity.

In my judgment, however, there is no ambiguity whatever in this section. If any ambiguity arises at all, it is solely injected by the marginal note itself, and I cannot accept the argument that the marginal note should then have the effect of resolving in a particular way an ambiguity for which it is itself wholly responsible. The language of the section seems to me to be almost too plain for argument. "The sewage disposal works" —that is to say, the works lying at the north part of the loop of the river—are thereafter "at all times" to "be conducted "so that the same shall not be a nuisance." That is perfectly general. But the subsection then goes on to give a particular illustration of the general: "and in particular the corporation "shall not allow" etc. "which shall be a nuisance or injurious "to . . . the inhabitants of Spondon."

If the argument is right that this section operates solely for the protection of the parish of Spondon, the generality at the beginning "so that the same shall not be a nuisance" must be treated as wholly otiose or meaningless. But that is not the end. The subsection continues, after the copulative "and," "and this Act shall not exempt or be deemed to exempt the "corporation from any liability for any nuisance arising from "such sewage disposal works or from any proceedings which "might but for this Act be taken against them." Pausing there, it is to be observed that those words are wholly general, and are not confined to the parish of Spondon. The section then goes on: "under the provisions of the Public Health Acts or "otherwise." "Or otherwise" again seems to me to mean exactly what it says. It means that this Act is not to exempt the corporation from liability for nuisance, or from proceedings for nuisance, which might be taken against them either under the Public Health Acts or otherwise—for example, under the general law. Nor can I read the final reference, giving liberty to the county council to take any proceedings which they may think fit, as excluding the rights of other persons to take proceedings which they may be entitled to take. It is true that the second subsection relating to the planting of the ten yards of trees and evergreen shrubs is exclusively for the benefit of the parish of Spondon. But without pursuing the matter in any greater detail, it appears to me impossible to hold, on the ordinary meaning of the words of that section, that the only persons to whom protection was given by the section were the parishioners or Rural District Council of Spondon.

There remains the use of the word "conducted." The opening language of the subsection, if I may repeat it, is: "The "sewage disposal works constructed on the lands acquired under "the powers of this Act shall at all times hereafter be con-"ducted." Sir Andrew Clark tried to persuade the court that the word "conducted" was one of narrow significance—narrower, for example, than the words "use and keep" in the Public Health Acts. I cannot so construe it. The word "conduct" seems to me to mean "manage" or "operate." This section, therefore, is in my judgment a prohibition against the corporation managing or operating their disposal works so as to cause a nuisance.

I hope that I shall be forgiven for disposing in a sentence with the alternative submission that section 109 is solely for the protection of the Derbyshire County Council. I do so because, quite frankly, I have been unable to comprehend it. The submission rests, I gather, on the circumstance that at the end of subsection (1) there is the reference to the fact that the county council may take any proceedings they may think fit. Such a submission is obviously in direct conflict with the second subsection and with the marginal note upon which Sir Andrew so strongly leaned for supporting his first contention. I can see no foundation for the argument. So far, then, section 109 seems to me not only to forbear from giving permission, express or by implication, for the operation of the sewerage works so as to cause any other person a nuisance, but indeed expressly to forbid it.

I turn next to section 113, from which Sir Andrew also sought to derive some help and support. I agree with the judge that section 113 is directed to giving power to the corporation to divert brooks or streams, and to use them when diverted for carrying sewage. I think that the whole section is directed to that matter, and to no other. But that permission, however far it may extend, is subject to the proviso which first follows, that: "Nothing in this part of this Act contained shall authorize the

" corporation to construct any works or do any other thing in " contravention of the Rivers Pollution Prevention Act, 1876, or " section 17 of the Public Health Act, 1875."

I agree that the words " in contravention of " are not very apt. The reference as regards the Rivers Pollution Prevention Act, 1876, is undoubtedly to section 3, which provides: " Every " person who causes to fall or flow or knowingly permits to fall " or flow or to be carried into any stream any solid or liquid " sewage matter, shall (subject as in this Act mentioned) be " deemed to have committed an offence against this Act." That sufficiently indicates that a form of penal proceeding is provided under the Act for commission of the offence created.

As regards the Public Health Act, section 17 provides as follows: " Nothing in this Act shall authorize any local authority " to make or use any sewer drain or outfall for the purpose of " conveying sewage or filthy water into any natural stream or " watercourse, or into any canal pond or lake until such sewage " or filthy water is freed from all excrementitious or other foul " or noxious matter such as would affect or deteriorate the purity " and quality of the water in such stream or watercourse or in " such canal pond or lake."

As has been pointed out in these courts, that section is in part a proviso to the powers which precede it, and in part an implied authority. By using in section 113 of the Act of 1901 the rather inapt phrase " in contravention of," it is said by Sir Andrew that what is meant is that, if proceedings are started under the Rivers Pollution Prevention Act, 1876, or under the Public Health Act, then this Act cannot be set up as a defence. Again, I cannot agree with Sir Andrew's contention. It appears to me that, though the phrasing is not entirely happy, the meaning is tolerably clear. It is to the effect that nothing in the Act of 1901 is to be taken to authorize the corporation to do anything which would or might cause the corporation to be proceeded against under either of the Acts mentioned; and that in no way qualifies or affects their liability (in the event of their so doing) to other persons who may be damaged in consequence.

It follows, therefore, that the power to divert streams, and the consequential power to carry the diverted streams laden with sewage into the Derwent, is subject to the limitation which this first proviso puts upon it; and, unless the condition of that first proviso is satisfied, then there is no power whatever under this section to do what the section otherwise authorizes. That result must be borne in mind when considering the second proviso.

The second proviso is that the corporation is to pay compensation for damage sustained by reason of the exercise of the powers "of this section." If, therefore, what is done is a "contra-"vention" of the Rivers Pollution Prevention Act or the Public Health Act, then the thing done is not something done under the powers of the section at all, and the second proviso accordingly has no application. I therefore think that, if anything, section 113 reinforces the view which I have expressed on section 109. Certainly it is, in my judgment, of no assistance to support the main contention of the corporation. I have already read subsection (15) of section 115, with its reference to proceedings under the general law, and I agree with the judge that that also tends to support (and to support not negligibly) the view which I have formed as to the meaning of the earlier section.

I therefore agree with Harman J. that the discharge through this pipe of the effluent from the sewage disposal works is not only something not expressly or impliedly permitted under this Act, but is in terms expressly prohibited by it. If that view is right, it is, as Sir Andrew Clark frankly admitted, the end of the appeal by the corporation on their main point.

But as we have heard a very full argument on a number of cases relating to the Public Health Acts, starting with the well-known case of *Glossop* v. *Heston and Isleworth Local Board*,[3] and in case I am wrong in my construction of the Act of 1901 (and out of respect to the arguments we have heard) it is perhaps useful and proper that I should make some observations—so far as they are relevant to the present case—on these more general matters. I refer, first, accordingly, to the *Glossop* case [3] itself. That was a case in which the plaintiff, Glossop, the owner of a house and pleasure grounds known as "Silver Hall," within the district of the Local Board, was "claiming an injunction against "the Local Board from permitting sewage, or water polluted by "sewage or other offensive matter, to pass through the drains or "channels under their control into the River Crane in such a "manner as to render the water of the river unfit for use by the "plaintiff." The River Crane was stated to be "an ancient "watercourse passing through the plaintiff's pleasure grounds, "and at a distance of about 30 yards from his house."

The defendant board, the Heston and Isleworth Local Board, had, by virtue of the Public Health Act, 1875, vested in them in November, 1875, the channels and drains, being the sewerage

[3] 12 Ch.D. 102.

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system of the neighbourhood referred to, those drains having been made by some predecessors of the defendant board. The action was started in July, 1876, within a matter of months after the vesting had taken place. It is stated[4]: " Nothing, " however, was actually done to abate the nuisance," and the plaintiff brought the action. " The defendants in their defence " denied the existence of the nuisance, and alleged that the state " of the River Crane was the same as it had been for more than " 20 years, and that it had in fact received a considerable amount " of sewage for many generations. They stated that they had " not had time to provide a proper system of sewers for their " district, but intended as speedily as possible to provide a proper " system of sewers and proper sewage works. . . . The plaintiff " moved for an injunction in the terms of his claim," and by consent that was turned into the trial of the action, and both parties gave evidence.

It is important to bear those facts in mind, and for this reason: Malins V.-C. granted the relief which the plaintiff sought, but his decision was reversed by the Court of Appeal. It seems to me that James L.J. clearly formed the view that, whatever might on the face of the pleadings have been the nature of the plaintiff's complaint and of his cause of action, he (James L.J.) treated it as a case in which the plaintiff was seeking, by a mandatory order of the courts, to compel the defendant board to expedite the intention which they had expressed of providing a proper system of sewage for their district. His judgment was as follows[5]: " It is quite manifest, from the form of the claim " and the evidence, that the action was not based upon any act " whatever done by the defendants. It is based entirely upon " their alleged neglect to perform the parliamentary duty cast " upon them as the sanitary authority of a particular district. " It is said that this is a very serious matter to the plaintiff and " to the public generally. It appears to me that if this action " could be sustained, it would be a very serious matter indeed for " every ratepayer in England in any district in which there is " any local authority upon which duties are cast for the benefit " of the locality. If this action could be maintained, I do not " see why it could not in a similar manner be maintained by " every owner of land in that district who could allege that if " there had been a proper system of sewage his property would " be very much improved.

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[4] 12 Ch.D. 102, 104.

[5] Ibid. 109.

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"I do not see why, if that is so, every owner of property in "London which has not received the benefits it ought to have "received from a complete system of sewage carried out by the "Metropolitan Board of Works might not say, 'My court or "'alley is not properly cared for,' and who might not bring an "action against the Metropolitan Board of Works or any local "board having duties in the district, and why he would not be "entitled to bring it on the very day the board was constituted "and the duties cast upon it. According to my view there is no "sufficient principle to sustain that, and no authority really "which comes near it, except the authority of the case before "Hall V.-C., which I will refer to."

Then, after a reference to section 13 of the Public Health Act, 1875, James L.J. continued: "If the sewer, being in the state in "which it was transferred to them"—that is, the defendants—"would, independently of the Act of Parliament, give to any "landowner or any riparian proprietor a right to an injunction "to restrain the use of that sewer, or the abuse of that sewer, "it appears to me they would be in the same position as any "other owner of a sewer would be. But the case here is not "based upon any common law nuisance, or any nuisance "existing, or any damage existing irrespective of the neglect of "the Act, but upon the alleged neglect to comply with the "provisions of the Act of Parliament."

At the end of his judgment,[6] after referring to certain cases, the Lord Justice said: "But those cases have no application to "this case, where all that can be alleged against the defendants, "even if the allegation were sustained, which does not appear to "me to be the case, is, that they have not, within a reasonable "time, performed the public duty which they owed, not to the "plaintiff, but to the district in which the plaintiff is one of the "inhabitant landowners. The only case the plaintiff has alleged "or attempted to prove is that he has not been relieved from a "damage to which he was subject before this body were called "into existence in the way he hoped to be, and as he would be "if they had done their work in draining this district." The judgments both of James L.J. and of the other Lords Justices are very long, and I do not propose to read any more of James L.J.'s judgment. Whether he did full justice to the nature of the plaintiff's claim as pleaded is perhaps open to some doubt, if I may venture to say so.

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[6] 12 Ch.D. 102, 117.

Brett and Cotton L.JJ. expressed themselves somewhat differently. Brett L.J. opened his judgment thus [7]: "It seems "to me in this case that the defendants have not been guilty of "any wrongful act, and they have not been guilty of any neglect "which gives the plaintiff a right to any remedy of any kind. "But if they have been guilty of any neglect, the proper remedy "has not been asked for, neither has the proper court been applied "to." Later he posed this question [8]: "Under those circum- "stances what is their position with regard to the law? They "have done no act. It is suggested it might have been proved "they had done some act, and it was said the plaintiff was taken "by surprise. I cannot accede to that argument." Then, after referring to the case before Hall V.-C. of *Attorney-General* v. *Mayor of Basingstoke*,[9] Brett L.J. said [10]: "So, indeed, "I am inclined to think that in the present case, under this "statute,"—that is, the Public Health Act—"if the former "board had done an act that would have given the plaintiff a "right to damages or to some other remedy, and the effect of that "act continued in the defendants' time, the defendants would "have been liable for the continuance of the consequences of "that act, and would have been liable to an injunction." I point out that the matter is not rendered easier by the fact that the Law Reports print the word "act" with a capital "A" as though it were referring to a statute; it means, of course, simply an instance of activity.

From Cotton L.J.'s judgment I take some passages. First he said [11]: "I agree with Brett L.J. that, as regards the question "of fact, if the right of the plaintiff would follow our decision on "that, he has made out his case; that is to say, he has shown, "in my opinion, that the water in this stream is in such a state "that if that were the result of an action of an individual or a "body not having parliamentary authority to put the stream into "such a state, or to do acts which necessarily brought the stream "into that state, he would have a ground of action against them. "But although that is established, it is a very different thing "and a very different consideration whether as against these "defendants he is entitled either to the decree granted by the "Vice-Chancellor or to any decree in this action . . . it must not "be supposed, although I concur in thinking that the plaintiff "is not entitled to any decree, that I am of opinion (or that the

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[7] 12 Ch.D. 102, 117.

[8] Ibid. 119.

[9] (1876) 45 L.J.Ch. 726.

[10] 12 Ch.D. 102, 121, 122.

[11] Ibid. 123.

"rest of the court are of opinion) that the defendants have a right "under this Act of Parliament to make any new sewer, and "thereby to conduct any fresh sewage matter into the River "Crane. In my opinion, if they were intending to do so, or had "done so, there would be a clear case on the part of the plaintiff "for an injunction against the defendants, because that would "be within the clear prohibition of the Act of Parliament"—a reference, I take it, to section 17 of the Public Health Act, 1875.

"The decree against them in substance, no doubt, was "intended to be a decree against them to restrain them from "permitting any sewage to go into the River Crane. It is not "said they have done any act the consequence of which has been "to bring the sewage down to the River Crane. If that were so, "unless they could show that in doing that act, and so causing "a nuisance to the plaintiff, they are protected by the Act of "Parliament, it would be the duty of this court, as it has done "in many cases already, to restrain the defendants from creating "a nuisance, and although they are a public body, having public "duties and powers to perform those duties, that would not "exempt them from legal liability in consequence of a nuisance "caused by them. On the evidence there is no ground for saying "they have done that. I shall have to refer to the cases on the "point on another part of the case, but it is sufficient to say here "that those cases for the present purpose may be disregarded. "It is not the act of the defendants that has caused any nuisance "to the plaintiff."

That decision was followed in *Attorney-General* v. *Dorking Union Guardians*.[12] I need not refer in detail to that case, but I observe that Cotton L.J. was also a member of the Court of Appeal which decided it.

Now I confess that I share in some degree the difficulty which Parker J. felt in regard to the ratio decidendi on the one hand of James L.J., and that of Brett and Cotton L.JJ. in the *Glossop* case on the other. In *Jones* v. *Llanrwst Urban District Council*[13] Parker J. used this language (and I read a substantial passage because of its later relevance to what I have to say)[13]: "I think it "clear that the principle of *Fletcher* v. *Rylands*[14] would apply to "the owner of a sewer, whether he made the sewer or not: see "*Firth* v. *The Bowling Iron Co.*[15] His duty at common law would "be to see that the sewage in his sewer did not escape to the

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[12] 20 Ch.D. 595.

[13] [1911] 1 Ch. 393, 405, 406.

[14] (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

[15] (1878) 3 C.P.D. 254.

"injury of others, and mere neglect of this duty would give any "person injured a good cause of action. James L.J. evidently "thought there was no common law nuisance, or at any rate that "the action was not a bona fide action to remedy a private wrong. "On the other hand, Brett and Cotton L.JJ., while holding that "the plaintiff would have had a cause of action for what was "being done if the sewers in question had belonged to a private "person, held that the defendants were not liable because they "were a statutory body with only a limited property in, and with "only limited powers, and therefore limited duties, with respect "to, the sewers transferred to them by the Act. They would be "liable for nuisance caused by the exercise of any power vested "in them, but not liable, except upon prerogative writ of "mandamus, for neglect to perform their statutory duty.

"In other words, supposing the case put by James L.J. of "an existing nuisance at the time of the transfer, the plaintiff's "remedy had, in their opinion, gone altogether, and, so far as "I can see, without compensation. In *Foster* v. *Warblington* "*Urban District Council*[16] Stirling L.J. seems to have thought "that the ratio decidendi of *Glossop* v. *Heston and Isleworth* "*Local Board*[17] was to be found in the judgments of Brett and "Cotton L.JJ., and certainly those Lords Justices constituted "the majority of the court. If the explanation of Vaughan "Williams L.J. is to prevail, I am of opinion that *Glossop* v. "*Heston and Isleworth Local Board*[17] has no application to the "present case"—that was the view of Vaughan Williams L.J. in *Foster* v. *Warblington Urban District Council.*[18]

"I am satisfied that the plaintiff is bona fide complaining of "a private wrong, and that he is not, under colour of such a "wrong, merely attempting to compel the defendants to fulfil "their statutory duty. If, on the other hand, the explanation of "Stirling L.J. is to prevail, it is impossible to say whether the "case applies without tracing the history of the sewerage system "of Llanrwst."

But, whatever may be the true ratio decidendi of the judgments in the *Glossop* case[19] and the *Dorking Union* case[20] which followed, they must, I think, clearly be taken as deciding that where a local authority has inherited drains or sewers under the Public Health Act, and those drains or sewers constitute a nuisance by reason only that they have ceased to deal adequately with the sewage of the authority's district, then the local authority, not having themselves been at fault save that they have not used the powers vested in them to enlarge the sewerage system, are not liable to be sued in the courts, for such an action would be, in effect, an action to compel the exercise of the statutory powers, or performance of the statutory duty, by the local authority.

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[16] [1906] 1 K.B. 648; 22 T.L.R. 421.

[17] 12 Ch.D. 102.

[18] [1906] 1 K.B. 648.

[19] 12 Ch.D. 102, 109.

[20] 20 Ch.D. 595.

Further, it must, I think, be taken from these cases as established that the word " use " in section 17 of the Public Health Act, 1875, does not involve a prohibition against the local authority permitting the inhabitants of their district (in exercise of statutory or other power or right authorizing them so to do) to put sewage in the local authority's drains or sewers. Similarly, the word " kept " in section 19 of the Public Health Act must be construed by reference to its associated words " constructed," " covered " and " ventilated," and does not constitute an obligation to enlarge or reconstruct, if the drains or sewers have become in course of time inadequate for the quantity of the sewage of the district.

But the *Glossop* [21] and *Dorking* [22] decisions are themselves limited to cases where the local authority has, to use the word I have already used, " inherited " the drains and sewers from some predecessor. They do not in terms cover the case where the local authority has itself constructed the sewerage system. Indeed, some of the language of Brett and Cotton L.JJ. seems to indicate a distinction in that respect vital to the question of liability.

Sir Andrew Clark, however, has argued that since the later cases of *Robinson* v. *Workington Corporation*,[23] and more particularly *Hesketh* v. *Birmingham Corporation*,[24] that distinction is no longer valid or maintainable; that is to say, if the local authority itself had constructed the drains and sewers pursuant to the Public Health Act, and the drains and sewers were, at the time of their completion, satisfactory, then no cause of action arises against the local authority from mere passive conduct, though the drains and sewers have in fact since become inadequate owing to increase of population.

Before passing to the two later cases which I have mentioned, I venture to make one or two observations on the use of the word nonfeasance which occurred in the judgment of Lord Esher M.R. and also the judgment of Cotton L.J. in the *Dorking* case.[25] The proposition that a local authority is not liable for nonfeasance in

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[21] 12 Ch.D. 102.

[22] 20 Ch.D. 595.

[23] [1897] 1 Q.B. 619.

[24] [1924] 1 K.B. 260.

[25] 20 Ch.D. 595.

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regard to highways rests, I understand, upon particular historical grounds, and may, I venture to suggest, lead to error or confusion if it is assumed that a similar proposition can be necessarily applied in the case of sewers and drains. As regards sewers and drains, it is, in my judgment, necessary to keep clearly in mind the possibility of two distinct causes of action, namely, (1) for nuisance, and (2) for negligence. I venture to think that the distinction may not always have been clearly observed in certain of the earlier cases.

As regards negligence (and I may say that we are not in this case concerned with negligence at all, there being no claim for negligence in the statement of claim) it may well be that nonfeasance, in the sense of failing to perform some positive statutory duty, does not give rise to a cause of action for negligence against the local authority in respect of its sewerage system. In regard to nuisance, however, I think that the question of nonfeasance, as distinct from misfeasance, has no real relevance. As regards nuisance, the question is whether the thing complained of as a nuisance is expressly or impliedly authorized by the Act of the legislature in accordance with which the works were constructed, or whether (and this is perhaps the same thing) the nuisance complained of is the inevitable consequence of that which the Act both authorized and contemplated. On this question, it seems to me that whether the thing complained of can be described as nonfeasance or misfeasance is wholly beside the point.

I refer also to one other general matter. It was suggested that local authorities have a special immunity from the so-called rule in *Rylands* v. *Fletcher*.[26] I am not, as at present advised, satisfied that that is certainly so. Parker J. clearly applied the rule in *Jones* v. *Llanrwst Urban District Council*.[27] So far as relevant to the facts as they are in the present case, I think that the result is the same whether that which is complained of would render the doer of the act liable on the grounds of nuisance or on the grounds of the rule in *Rylands* v. *Fletcher*[28] (if applicable); in either case the question depends on whether the Public Health Act or the special Act, as the case may be, provides, on the principles stated, a defence to the claim which otherwise would lie.

I now come to the two authorities to which I have earlier referred, *Robinson* v. *Workington Corporation*[29] and *Hesketh*

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[26] L.R. 3 H.L. 330.

[27] [1911] 1 Ch. 393.

[28] L.R. 3 H.L. 330.

[29] [1897] 1 Q.B. 619.

v. *Birmingham Corporation.*[30] I need pause only for a very brief time on the former. It does not clearly appear from the report in the Law Reports that the sewers which were there in question had in fact been made by the corporation sued, but Denning L.J. having referred to the report of the case in the Law Times Reports,[31] has noted that clearly they were so constructed. On the facts of that case, however, it is plain that the cause of action was neither more nor less than an attempt to compel performance, for the benefit of the plaintiff and his business, of the statutory duty which was laid upon the corporation under the Act to make and provide a proper drainage system.

Hesketh v. *Birmingham Corporation*[32] I would like to consider in a little more detail. It is, however, to be noted that that was not a case in which the plaintiff's complaint related to pollution. The nuisance alleged arose from excessive quantities of water in a brook or culvert, and the overflow of that water. The first contention of the plaintiff was that the defendant corporation had damaged him by a nuisance arising from the largely increased quantity of water passing down the culvert. The answer of the corporation to that contention was that the passing of that quantity of water down the culvert was authorized expressly, or by necessary implication, by statute. The plaintiff then fell back on a second and alternative point. "Granted," he said, "that the relevant sections of the Public "Health Act do authorize the passing of this quantity of water "down this culvert, still you, the corporation, are negligent in "that you have not done work which you could have done to "minimize the damage which I consequentially suffer." The answer to that contention was that it was not negligent for a local authority merely to fail to exercise statutory powers, more especially because the Public Health Act provided for such failure a specific remedy.

That being the nature of the case, in his judgment Bankes L.J. said[33]: "The plaintiff's case was that the acts of the "defendants in discharging the overflow of the sewers into the "brook without any statutory authority in that behalf amounted "to a nuisance, or that the defendants were guilty of negligence "in continuing to discharge the sewage into the brook after it "had become of insufficient capacity to carry it in consequence "of the growth of the population. No reference appears to have

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[30] [1924] 1 K.B. 260.

[31] (1922) 130 L.T. 476.

[32] [1924] 1 K.B. 260.

[33] Ibid. 266.

" been made at the trial to the provisions of the Public Health " Act, but after Mr. Upjohn's argument it seems plain that it is " impossible to adjust the rights of these parties without reference to the provisions of that Act which are to be found in " sections 15, 16 and 17. Mr. Hurst very frankly told us that " those sections were not present to his mind at the time of the " trial."

The Lord Justice then read the relevant part of those three sections, and he proceeded: " The effect of that section has been " considered in the case to which we were referred: *Durrant* v. " *Branksome Urban District Council*.[34] There North J. said: ' I " ' think that section recognizes in the clearest way that, subject " ' to complying with the provisions of that section, the local " ' authority have a right to empty their drains into a natural " ' stream or canal, pond and so on, observing, of course, the " ' provisions of that section. It is clear from that to my mind " ' that they may turn clean water into a stream, or what I may " ' call cleaned water into a stream. They may even turn water " ' that is sewage or filth into a stream if they free it from such " ' noxious matters as would deteriorate the stream itself.' And " Chitty L.J. says: ' The first part of that ' "—that is, section 17—" ' is prohibitory, and it is by way of proviso on something " ' that has gone before. The second part is explanatory. I do " ' not say that by itself it confers a power. I think the better " ' reading is that the power is conferred by section 16, and in " ' this portion of the section, which says that the sewage is not " ' to be poured in until it is freed from foul or noxious matter, " ' the legislature assumes it had already said something that " ' would justify the pouring of pure water or water not fouled " ' or noxious into the stream or canal.'

" Therefore you find in the combination of those passages " statutory authority for discharging clean or cleaned water into " a stream, and if the stream itself is of such a character that " the discharge of foul water into it would not affect or " deteriorate the purity and quality of the water, you find " statutory authority for discharging foul water. Some day an " allegation that foul water has been discharged into a stream in " such a way as to materially affect its quality may give rise to " a serious question as to the party on whom the onus lies of " showing that the case does or does not fall within the section." I need not refer to more of that judgment.

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[34] [1897] 2 Ch. 291, 295, 305.

Scrutton L.J.[35] undoubtedly used language of a more general character. But in so far as his (Scrutton L.J.'s) language supports the broad contention of Sir Andrew Clark, it must, I think, be treated as obiter. Bankes L.J., indeed, seems, from the language of his judgment, to have indicated that in a case where the nuisance complained of was pollution, the fact that the authority had itself made the sewer would prima facie render them liable; and so, if that is right, the case would on that ground be distinguishable from the *Glossop* case,[36] even though the nuisance arose merely from subsequent inadequacy of the sewer.

The result, therefore, seems to me to be that the question whether the principle of the *Glossop* [36] and later cases is applicable only where the authority sued has not itself constructed the sewers complained of as creating a nuisance by pollution has not yet been actually decided. For my part, I see great force in Sir Andrew's argument that there is no logical or valid distinction between the case where a local authority has inherited, say, half a century ago, sewers and drains made (and, at the time of their construction, adequately made) by some predecessor, and a case in which a local authority itself made half a century ago some sewers and drains which, when they were made, were similarly adequate properly to drain the city or town without causing pollution. But, as I have said, the cases do not seem to me actually to have decided that precise point, and I think that in this case it is unnecessary that I should express a concluded view upon it, because on the facts I think that the present case is clearly distinguishable from the type of case considered in the earlier authorities.

We are here concerned, not with a drain or a sewer down which there is sent by local inhabitants (having the right so to do) sewage matter which passes accordingly into a river; we are here concerned with sewage disposal works built on the corporation's own land. We have not seen the plans which are referred to in section 106 of the Act of 1901 for those sewage disposal works. We were told that the plans did not in fact contain any drawing of an effluent pipe leading from the sewage disposal works to the river, though no doubt some such discharge pipe must have been contemplated. But what the local authority are doing, as I follow it, is on their own land pumping or otherwise diverting into the river, by such mechanical or other means as may be there, the effluent after treatment in the beds and tanks of the disposal works.

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[35] [1924] 1 K.B. 260, 271.

[36] 12 Ch.D. 102.

In my judgment, therefore, as at present advised, if the Public Health Acts applied to this case, or if—contrary to the view which I have expressed—the Act of 1901 ought to be construed as equivalent in effect to the Public Health Act, there would be no statutory defence available to the corporation for what they are doing in discharging effluent through this pipe into the Derwent River.

This also, I think, may fairly be noted: this case cannot by any proper sense of language be called an action obliquely directed to commanding a local authority to perform a public duty. The plaintiffs are claiming damage in respect of injury suffered to their property some miles from the county borough of Derby. The plaintiffs are not concerned with, nor are they complaining about the method by which the citizens of Derby are provided with a sewerage system. Indeed, if the sewage disposal works were shut down, the inhabitants of Derby, so far as I understand, would not in the least degree be affected; no such frightful results would occur in Derby as would occur if the sewers and drains themselves were stopped up. The result would be that all the sewage treated with storm water would presumably be extruded from the storm water overflows direct into the River Derwent. That, of course, would not in the least help the plaintiffs, but the point is made in order to demonstrate the true character of the action which the plaintiffs are bringing.

The point is one which the judge noted (and I think that it was a legitimate consideration on his part) in his judgment, where he said: "The plaintiffs' claim here is not that the corporation "have neglected to provide further sewers, although it may be "that the remedy for that of which they complain will be the "construction of further sewers. They are not ratepayers of "Derby who complain of the insufficiency of the drainage of the "city; their complaint is the converse, namely, that the city "is so drained that their property outside it is damaged." It follows that many of the observations which James L.J. directed to the plaintiff in the *Glossop* case[36] would, on any view, be quite inapplicable to the present case.

So much for the main point raised by the corporation. I can deal more briefly with the question of the appropriate remedy, assuming that they are wrong (as I think they are) on their main submission. With some aspects of this matter I have indeed already dealt. I venture to think that the fallacy which underlies this part of the corporation's argument is based on the statement made on their part that an injunction is purely discretionary—if by that is meant that in a case where a person's rights, such as the plaintiffs' rights, are being damaged, and there is a threat of continuing damage, the question whether an injunction will be granted is determined by the court upon balance of convenience on one side or the other.

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[36] 12 Ch.D. 102.

In my judgment, that is not a correct statement of the position. It is, I think, well settled that if A proves that his proprietary rights are being wrongfully interfered with by B, and that B intends to continue his wrong, then A is prima facie entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstance that damages are an adequate remedy for the wrong that he has suffered. In the present case it is plain that damages would be a wholly inadequate remedy for the first-named plaintiffs, who have not been incorporated in order to fish for monthly sums.

The general rule which I have stated, in my opinion, applies to local authorities as well as to other citizens. Equally, of course, the court will not impose on a local authority, or on anyone else, an obligation to do something which is impossible, or which cannot be enforced, or which is unlawful. So the practice is adopted in the case of local authorities of granting injunctions, and then suspending their operation for a time, long or short. Such a practice has been long established—at least since *Attorney-General* v. *Birmingham Borough Council* [37]—and, frequently applied; see again, for example, Parker J.'s decision in *Jones* v. *Llanrwst Urban District Council*.[38]

Regulation 56A of the Defence (General) Regulations, 1939, is, beyond doubt, a matter proper to be considered. But the mere fact that, without obtaining a licence, the authority would be unable in any case to do the work is not, in my judgment, a sufficient reason why the ordinary procedure should not be followed.

What, after all, are the alternatives? It is suggested by Sir Andrew Clark that the plaintiffs should be left to bring a series of actions for damages. In every such action the plaintiffs would, so far as I can see, have again to prove their case, for the corporation could put them to such proof by a mere traverse of

[37] 4 K. & J. 528.

[38] [1911] 1 Ch. 393.

the facts alleged. The result would obviously be a vast expenditure of costs, a matter upon which, I understand, the corporation are themselves particularly tender. I think that much the same result would follow if the plaintiffs were merely given liberty to apply for an injunction, for they would then presumably have to establish as a matter of fact that some circumstances had arisen which then justified the granting of an injunction which had not been granted at the time of the trial. Nor, in my judgment, would the matter be materially affected even if the corporation were to give some kind of undertaking to get on with the work, when it was possible or convenient to do so in the ordinary way.

It appears to me that the corporation, having been proved to be wrongdoers (and not disputing that they are wrongdoers), the onus should be upon them, if they want a further suspension, to satisfy the court that justice requires that a further suspension should be granted. If the corporation show that they are unable to do more than they are doing, or that they cannot get any licences to do anything at all, then I have no doubt at all that a further suspension will be granted until such time as this urgent matter can be put in hand.

Finally, the objection that the injunction is permanent in form seems to me to be entirely unsubstantial. In any event, there is at the end of the order liberty to apply; and when all these matters have been put right, the court will no doubt be ready to hear any application which the corporation may be minded to make to discharge the injunction.

As a matter, therefore, of jurisdiction and general principle, I see no ground whatever why the injunction which was granted should not have been granted. Still less do I see any ground on which this court could be invited to interfere with the discretion exercised by the judge. The result, therefore, as regards the corporation appeal is that in my opinion the judgment of Harman J. is correct in every particular, and the appeal wholly fails.

I now come to the second appeal, that of the British Electricity Authority. These appellants are not suffering from what I venture to call the complexes about immunity of public corporations from which the corporation appear to suffer. Like the corporation, the British Electricity Authority accept the findings of fact on the part of the judge, and they accept, therefore, the finding that they are substantially contributing—in this case by temperature only—to the pollution of this river. But they also accept that an injunction should go against them; they contend only that the form of that injunction should be qualified having regard to the language of certain statutory provisions which are applicable to them.

The nature of the authority's appeal is sufficiently indicated by their notice of appeal. The proposed form of injunction which they seek is this: "That the order in this action made by "Harman J. on April 9 and entered on May 7, 1952, may be "varied by inserting after the injunction therein lettered (b) the "words 'Provided that (so far as concerns any alteration "'in the temperature of the waters of the said rivers caused "'by any effluent from the said premises of the defendant "'authority) the foregoing injunctions lettered (a) and (b) shall "'not enure to the plaintiff Pride of Derby and Derbyshire "'Angling Association Ld. or to the plaintiff the Right Honour-"'able William Henry Leicester Stanhope Earl of Harrington "'or to either of them or to the sequels in title to either of them "'against the defendant authority so long as the defendant "'authority shall comply with the proviso to section 37 subsec-"'tion (1) of the Derbyshire and Nottinghamshire Electric Power "'Act, 1929, that is to say, shall return water abstracted from "'the River Derwent pursuant to the said subsection (except "'that unavoidably lost by evaporation) in such a condition as "'not to cause (in the waters of the said river where the same "'flow below and after receiving such effluent) injury to fish.'"

The power station in question was vested in the British Electricity Authority under the Electricity Act, 1947, on April 1, 1948. It is admitted by the plaintiffs that the Act of 1929, and particularly sections 36 and 37, continue to apply, and are therefore available to the defendant authority.

The question under appeal turns exclusively on the effect of those two sections. Section 36 provides: "The company"—that is the Power Company, which was the predecessor-in-title of the authority—"may upon the lands described in the First "Schedule to this Act maintain carry on work and use and from "time to time extend alter and renew the generating station "and works of the company situate upon the said lands and "they may on such lands exercise in relation to the said station "and works the powers conferred by the Act of 1901 in relation "to the generating stations and works by that Act authorized "and the powers conferred by the Electricity (Supply) Acts, "1882 to 1928."

Section 37 provides: "(1) The company may abstract water

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"from the River Derwent and may utilize the same for condensing and other purposes of the generating station situate "upon the lands described in the First Schedule to this Act: "Provided that all water so abstracted . . . shall be returned to the "river above Borrowash Weir in such a condition as not to cause "injury to fish. (2) Nothing in this section or in the section "of this Act of which the marginal note is 'Maintenance and "'use of generating station'"—and that is section 36—"shall "authorize the company to abstract water from or return water "to the River Derwent in any manner contrary to or inconsistent "with the provisions of the deed set forth in the Second Schedule "to this Act or in any manner prejudice diminish alter or take "away any of the rights privileges powers or authorities vested "in or enjoyed by Charles Joseph Leicester Earl of Harrington "or his heirs or successors in estate or any person in trust for "him or them as owner or owners of Borrowash Mill and the "weirs and sluices referred to in the said deed or as riparian "owner or owners upon the river except so far as may be provided "by the said deed."

The first point raised in the appeal is a brief one, and is to this effect. Mr. Salt seeks to incorporate into the injunction by means of his proviso words operating to construe the proviso to subsection (1) of section 37. In general, it is not, I think, the practice of the court, when granting an injunction, to construe the language of the restriction in the statute or contract which has been broken, and which the defendant is restrained from breaking again. But in this case the judge used language in the course of his judgment which has led Mr. Salt to make this application. Harman J. said this: "It was further argued on "the plaintiffs' behalf that the quantity of chlorine found in the "effluent itself was injurious to fish, and that the proviso"—that is, the proviso to section 37 (1)—"does not mean that the "river, after the effluent has mingled with it, shall not be "injurious, but that the effluent itself shall not be injurious. In "my judgment, the right answer is the latter, and if so, there "is evidence that on some occasions a quantity of free chlorine "is emitted . . ."

I am not quite sure whether the judge meant that the effluent itself, before it enters the river at all, must be of such a temperature, and of such a character, as not to be liable to cause injury to fish. I am not suggesting that he did; but if he did, I think, with all respect, that he would not be right. I think myself that the construction of this proviso is tolerably clear. Indeed,

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during the course of the argument, I suggested that what it meant was this, "that the water so abstracted shall be returned to "the river in such a condition as not to cause *by its presence* "*in the river* injury to fish," and that view was accepted both by Mr. Russell and by Mr. Salt. Having expressed that view of the meaning of the proviso, and having also mentioned the agreement of counsel, I think it is unnecessary to do more. I therefore do not think that any qualification to the form of the injunction should be made to give effect to that view of construction.

The defendant authority's second point is more difficult. The rights of the second plaintiff, the Earl of Harrington, may, as riparian owner, be much more extensive than those of the first plaintiffs. The right of the second plaintiff was, in my view, correctly taken by Harman J. where he said: "The law is "stated in much the same way in *John Young & Co.* v. *Bankier* "*Distillery Co.*[39]" and after reading the headnote, Harman J. cited the following passage from Lord Macnaghten's speech in that case where he said[40]: "The law relating to the rights of "riparian proprietors is well settled. A riparian proprietor is "entitled to have the water of the stream, on the banks of which "his property lies, flow down as it has been accustomed to flow "down to his property, subject to the ordinary use of the flowing "water by upper proprietors, and to such further use, if any, "on their part in connexion with their property as may be "reasonable under the circumstances. Every riparian proprietor "is thus entitled to the water of his stream, in its natural flow, "without sensible diminution or increase and without sensible "alteration in its character or quality. Any invasion of this "right causing actual damage or calculated to found a claim "which may ripen into an adverse right entitles the party injured "to the intervention of the court."

It is obvious that a prohibition against making a "sensible "alteration" in the character or quality of the water may impose a much greater burden on the Electricity Authority than an alteration which is liable merely to cause injury to fish. The first plaintiffs, the Angling Association, are, in any case, not entitled to anything more than a protection of their rights to fish, a point—distinguishing their rights from those of the second plaintiff—which was apparently overlooked when the matter of the form of the injunction was discussed and settled.

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[39] [1893] A.C. 691.

[40] Ibid. 698.

But Mr. Salt argued that the second plaintiff, the Earl of Harrington, had lost any riparian rights greater than the first plaintiffs' rights to protect fishing, and that, Mr. Salt said, depended upon the effect of sections 36 and 37, and the scheduled agreement which is there referred to. The scheduled agreement, which was also confirmed in section 38 of the Act of 1929, was an agreement giving effect to an arrangement of this character, put briefly: that the Power Company, the predecessors of the authority, should be entitled to operate certain weirs and sluices, the property of the Earl of Harrington, in such a way that in dry weather they would cause the banking up of a sufficient head of water to supply the requirements of the Power Company for their power station, and for that advantage they paid the Earl a substantial sum of money. Mr. Salt said, therefore, that if the last words of section 37 (2), " or as riparian owners or owners " upon the river," meant what they appeared to mean, then the proviso to subsection (1) became a complete nullity, because there would be no point in providing that the water should not be returned in such a condition as to injure fish. Further, Mr. Salt said, the power to carry on the power station, which formed the basis of the agreement (and which is expressly referred to in section 36), necessarily involved some interference with the rights as riparian owner of the Earl of Harrington.

On the other hand, Mr. Russell said that the proviso to the first subsection was for the protection of people who might have fishing rights, whatever might happen thereafter to the riparian rights owned by the Earl of Harrington. Mr. Russell further said that this subsection (2) of section 37 applied no less to section 36 than to section 37; and that if, as Mr. Salt contended, the carrying on of the power station destroyed as a necessary consequence the riparian rights, or some of the riparian rights, of the Earl of Harrington, then there was no point whatever in adding those words at the end of section 37 (2).

I must say that on the face of the language as used in the subsection it is difficult to see any answer to the argument on construction put forward by Mr. Russell. The draftsman has inserted in the widest possible terms, after a specific reference to the rights of the Earl of Harrington as owner of the mills and weirs, the words " or as riparian owner or owners upon the " river." The words of any clause in a statute, or in an agreement, have to be construed according to the properly admissible surrounding circumstances. What were the facts in 1929 when this Act was passed? We know that the land lying on the right bank of the river, which is now the property of the Electricity Authority, was then the property of the Earl of Harrington; in other words, the Earl was a riparian owner immediately opposite the outfall from the Power Company's works, but beyond that there is, so far as I can see, no evidence at all. We do not know what the facts were as to the temperature of the water when it was discharged from the power station in 1929, and whether it could be said, as a fact, that the necessary consequence of having the power station operated on its present site must have been (and must have been known to have been) to cause some "sensible alteration" of the character and quality of the water; so that any other view of the effect of this section than that suggested by Mr. Salt would inevitably mean some derogation from the Earl of Harrington's grant in the scheduled deed.

It is true that the second plaintiff sued as a riparian owner, but the main question in the action obviously was in regard to the fishery, and in that matter the Earl of Harrington joined forces with the first plaintiffs in his attack upon the three defendants. Nor, indeed, so far as I understand, is it suggested that at the moment the second plaintiff (the Earl of Harrington) is suffering from (or likely to suffer from) any damage to his riparian rights over and above anything that may be done to the fishery, nor has he made any specific complaint to that effect.

In such circumstances, and having regard in particular to the fact that the injunction in its widest form could not be sustained on the part of the first plaintiffs, it seems to me that the fair and just thing to do at the present time is to limit the present injunction in the way suggested so as only to prohibit the Electricity Authority from returning the water, after using it, in such a condition as to cause injury to fish, but to give to the second plaintiff (and to his successors-in-title) liberty to apply for a further injunction, if he should desire to contend, or if he can show, that in some other way some other of his riparian rights are being injuriously affected by the authority's activities.

To that extent, therefore, the appeal on the part of the British Electricity Authority succeeds.

DENNING L.J. In submitting the appeal of the corporation, Sir Andrew Clark urged that there was a difference between misfeasance and non-feasance. He admitted that the corporation had been guilty of non-feasance, because they had not enlarged their sewerage works so as to cope with the increased population. But that, he said, did not give rise to an action at law; the only remedy was by complaint to the Minister. There is one decisive answer to that argument, and it is this: the distinction between misfeasance and non-feasance is valid only in the case of highways repairable by the public at large. It does not apply to any other branch of the law. I am well aware that in 1924, in *Hesketh* v. *Birmingham Corporation*,[41] Scrutton L.J. said that "The general rule is that a local authority is liable for "misfeasance, but not for non-feasance"; but when he said that, I fear that for once Homer nodded.

It would, I think, be very unfortunate if the exemption for non-feasance was extended to local authorities generally. Even in highway cases, it has been said to be unsatisfactory: see *Swain* v. *Southern Railway Co.*[42]; it introduces distinctions so fine as to be scarcely perceptible (compare *Boorman* v. *Brown* [43]); and it is only to be explained on historical grounds. I tried to trace its history and its limits in a note I wrote in 1939 in the Law Quarterly Review, Vol. 55, p. 343.

If we put highway cases on one side, there are innumerable cases to be found where public authorities have been held liable for non-feasance. Let me give just four instances over the centuries. In 1594 the parson at Quarley in Hampshire was under a public duty to keep a common bull for the service of the cows of his parishioners. For three years he neglected to find a bull, and it was held that every inhabitant who had suffered damage was entitled to bring an action: *Yielding* v. *Fay*.[44] In 1800 the corporation of Lyme Regis were under a public duty to repair the sea wall; they failed to do it, and the sea came in and overran some cottages. It was argued that the corporation were not liable for non-feasance, but they were held liable by all the courts, and by the House of Lords: see *Henly* v. *Lyme Regis Corporation*.[45] In 1900 the Portslade Urban District Council failed to clean out its sewers, and thus caused a nuisance to the plaintiff. It was held by this court that they were liable to an action: see *Baron* v. *Portslade Urban District Council*.[46] Finally, in 1943, the Islington Borough Council had taken over a disused tramway, but had taken no steps to rid the highway of the danger caused by the derelict tramlines, and they were held by this court to be liable for the consequent death of a cyclist: *Simon* v. *Islington Borough Council.*[47]

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[41] [1924] 1 K.B. 260, 271.

[42] [1939] 2 K.B. 560, 576.

[43] (1842) 3 Q.B. 511, 524.

[44] (1594) Cro.Eliz. 569.

[45] (1828) 5 Bing. 91, 109; (1832) 3 B. & Ad. 77, 93; (1834) 8 Bli.N.S. 690.

[46] [1900] 2 Q.B. 588.

The only cases, other than highway cases, where it has been suggested, at any rate by this court, that a local authority are exempt from liability for non-feasance are the *Isleworth* case,[48] the *Dorking* case,[49] the *Workington* case [50] and the *Birmingham* case,[51] but those were all cases of a particular kind of non-feasance. They were cases where all that could be said against the local authority was that they had failed to carry out their statutory duty to drain their district and, on the true construction of the statute, the remedy for that omission was not by action at law, but by complaint to the Minister. Those four cases do not illustrate any general exemption for non-feasance, but only the rule that the question whether an action lies for breach of a statutory duty depends on the true construction of the statute. That appears clearly from the explanation which Lord Esher M.R. himself gave in *Peebles* v. *Oswaldtwistle Urban District Council* [52] of the *Workington* case.[50]

Once rid of the distinction between misfeasance and non-feasance, the case can be reduced to simple terms. The first question is: have the plaintiffs a prima facie cause of action at common law? If so, the second question is: have the defendants a defence by reason of statutory authority? In this case, negligence is not alleged. The only cause of action available to the plaintiffs is an action for nuisance. I pause here to say that I doubt whether the doctrine of *Rylands* v. *Fletcher* [53] applies in all its strictness to cases where a local authority, acting under statutory authority, builds sewers which afterwards overflow, or sewage disposal works which later pour out a polluting effluent, for the simple reason that the use of land for drainage purposes by the local authority is " such a use as is proper for the general " benefit of the community," and is on that ground exempt from the rule in *Rylands* v. *Fletcher*,[53] see *Rickards* v. *Lothian*,[54] *per* Lord Moulton, approved by the House of Lords in *Read* v. *J. Lyons & Co. Ld.*,[55] *per* Lord Simon and *per* Lord Uthwatt; and also on the ground of statutory authority, see *Hammond* v. *St. Pancras Vestry*,[56] *per* Brett J.

But although the plaintiffs may not be able to rely on the doctrine of *Rylands* v. *Fletcher*[57] as such, they have a perfectly good cause of action for nuisance, if they can show that the defendants created or continued the cause of the trouble; and it must be remembered that a person may "continue" a nuisance by adopting it, or in some circumstances by omitting to remedy it: see *Sedleigh-Denfield* v. *O'Callaghan*.[58]

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[47] [1943] K.B. 188.

[48] 12 Ch.D. 102.

[49] 20 Ch.D. 595.

[50] [1897] 1 Q.B. 619.

[51] [1924] 1 K.B. 260.

[52] [1897] 1 Q.B. 625, 627.

[53] L.R. 3 H.L. 330.

[54] [1913] A.C. 263, 280.

[55] [1947] A.C. 156, 169, 187.

[56] (1874) L.R. 9 C.P. 316, 322.

This liability for nuisance has been applied in the past to sewage and drainage cases in this way: when a local authority take over or construct a sewage and drainage system which is adequate at the time to dispose of the sewage and surface water for their district, but which subsequently becomes inadequate owing to increased building which they cannot control, and for which they have no responsibility, they are not guilty of the ensuing nuisance. They obviously do not create it, nor do they continue it merely by doing nothing to enlarge or improve the system. The only remedy of the injured party is to complain to the Minister. That was the position in the four "non-feasance" cases which I have mentioned. In the *Isleworth*[59] and *Dorking* cases,[60] the local authority had not themselves constructed the sewers; they had only taken them over from others, and done nothing. In the *Workington*[61] and *Birmingham* cases,[62] the local authority had themselves constructed a drainage system which was quite sufficient at the time, but it later became inadequate through increased building which the local authority could not control.

It is very different, however, when the local authority themselves do the increased building, or permit it to be done, because they are then themselves guilty of the nuisance. They know (or ought to know) that the increase in building will cause the existing sewers to overflow, and yet they allow it to go on without enlarging the capacity of the sewerage system. By so doing, they themselves are helping to fill the system beyond its capacity, and are guilty of the nuisance. That is, I think, fully established by *Hawthorn Corporation* v. *Kannuluik*,[63] in the Privy Council (of which I have examined the record) and *Hanley* v. *Edinburgh Corporation*[64] in the House of Lords.

A moment's reflection will show that the four "non-feasance" cases have little or no application at the present day. In the nineteenth century, local authorities had no authority over increased building; they did not build dwelling-houses themselves, and they could not control building by others; and anyone who built a house had a statutory right to connect it to the sewer. But in the last few years the position has radically changed. Local authorities have built more houses than anyone else, and under the Planning Acts they have full control over the building in their district. They cannot now disclaim responsibility for increased building. By building houses themselves, or permitting others to build them, they become responsible for any nuisance that results in the sewerage system, just as the corporations were responsible in the *Hawthorn* [65] and *Edinburgh* cases.[66]

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[57] L.R. 3 H.L. 330.

[58] [1940] A.C. 880; 56 T.L.R. 887; [1940] 3 All E.R. 349.

[59] 12 Ch.D. 102.

[60] 20 Ch.D. 595.

[61] [1897] 1 Q.B. 619.

[62] [1924] 1 K.B. 260.

[63] [1906] A.C. 105.

[64] [1913] A.C. 488; 29 T.L.R. 404.

It would not be right to found the decision in this case on that point, because no evidence was given of the building or planning activities of the Derby Corporation; but their responsibility is amply shown on other grounds. When the increased sewage came into their sewage disposal works at Spondon, they took it under their charge, treated it in their works, and poured the effluent into the river Derwent; but their treatment of it was not successful in rendering it harmless; it was still noxious. Their act in pouring a polluting effluent into the river makes them guilty of nuisance. Even if they did not create the nuisance, they clearly adopted it within the principles laid down in *Sedleigh-Denfield* v. *O'Callaghan*,[67] and they are liable for it at common law unless they can defend themselves by some statutory authority.

Have they, then, any statutory authority to commit this nuisance? None at all. This corporation, like other local authorities, had statutory authority to pour a harmless effluent into the river, but again, like other local authorities, they had no authority to pour into the river an effluent which was noxious or polluting. That is made plain by section 17 of the Public Health Act, 1875 (now section 30 of the Public Health Act, 1936); section 3 of the Rivers Pollution Prevention Act, 1876 (now section 2 of the Rivers Pollution Prevention Act, 1951); sections 109 and 113 of the Derby Corporation Act, 1901, and *Midwood & Co. Ld.* v. *Manchester Corporation*.[68] The corporation are, therefore, guilty of a nuisance, and are liable in damages to any riparian owner or fishery owner who has suffered damage by it.

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[65] [1906] A.C. 105.

[66] [1913] A.C. 488.

[67] [1940] A.C. 880.

[68] [1905] 2 K.B. 597.

The remaining question is whether an injunction should be issued against them. Sir Andrew Clark argued that an injunction should not issue. The corporation, he said, could not dam back the sewage because that "would cause a most frightful "nuisance" to the inhabitants of Derby, and they could not extend their sewage disposal works because they were prohibited under the Defence Regulations from doing so without the consent of the Minister. These are strong reasons for suspending the injunction, but are no reason for not granting it. The power of the courts to issue an injunction for nuisance has proved itself to be the best method so far devised of securing the cleanliness of our rivers; and in this connexion it is significant that the law relating to nuisance has been expressly preserved by section 11 (6) of the Rivers Pollution Prevention Act, 1951. The issue of an injunction does not interfere with the power of the Minister to determine the proper order of priority of public works, but it does mean that, if these works are to be deferred, the court will want to know the reason why. Only an overriding public interest will suffice.

One further point. It has, I believe, been suggested in some of these cases that the individual members of a corporation may themselves be liable to be committed for breach of an injunction. As to that, I would only say with Blackburn J. that, if it were necessary to decide that question, I should require time for consideration; see what was said by Kelly C.B. in *Mill* v. *Hawker*,[69] and by Blackburn J.[70] A corporation can in these days be fined —it could not previously—or its property sequestrated for breach of an injunction, but I would not myself wish to assert that individual members could be committed, unless I was satisfied by authority that it could be done.

The result is that I agree that the appeal of the corporation should be dismissed.

Turning to the appeal of the British Electricity Authority it raises only two points of construction. It seems to me that the provision in section 37 (1) of the Act of 1929 prescribes a standard for the effluent from the generating station. The used water, when returned into the river, must not, by its presence there, cause injury to fish. Section 37 (2) appears to me to be designed to protect the rights of the Earl of Harrington in regard to flow and quantity, but I doubt whether it entitles him to insist on a higher standard for the effluent than anyone else. If the effluent does not cause injury to fish in the river, he has not much cause for complaint.

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[69] (1874) L.R. 9 Ex. 309, 321.

[70] (1875) L.R. 10 Ex. 92, 94.

I think that the appeal of the authority should be allowed to the extent stated by the Master of the Rolls, and I agree with my Lord in the orders which he has proposed.

Romer L.J. I agree. Once it is conceded or established that the deplorable condition of the River Derwent below Borrowash Bridge is due in a substantial degree to the discharge of noxious material from the corporation's sewerage works (and there can be no doubt whatever that such is the fact) then the corporation can escape liability only by showing that the nuisance which has arisen is the inevitable result of the performance by them of that which they are authorized by statute to do. In my judgment, there are two conclusive reasons why that defence cannot succeed: first, the works which the corporation were authorized (and indeed compelled) to construct and maintain under the Act of 1901 were not such as inevitably to result in a nuisance by pollution to anybody, and, indeed, no nuisance did in fact occur for years after the works were put into operation. It was not inevitable in 1901 that the population of Derby would substantially increase, and there is certainly no indication in the Act of that year that Parliament envisaged that it would or might increase beyond the capacity of the authorized works; and if the population had remained static, or had increased only slightly, or (as was possible) had decreased, no question of a nuisance would ever have arisen.

Secondly, on the construction which the Master of the Rolls has placed on section 109 of the Act (and with which I entirely agree) it is impossible for the corporation to say that Parliament impliedly authorized them to create a nuisance, for it enacted in unmistakable language by that section that they were not to do so; and this intention of the legislature is fortified, if it needed fortification, by the references to the Rivers Pollution Prevention Act, 1876, and section 17 of the Public Health Act, 1875, in section 113 of the Act of 1901 (and see also section 115 (15)). It appears plain to me, therefore, that the corporation have no statutory defence to the plaintiffs' action; and, as they have no other defence, the action must succeed.

I would like, however, to say a word or two on the question whether an injunction should be granted against the corporation. It was strongly urged upon Harman J., and as forcibly urged upon us, that the plaintiffs should be relegated to their right to

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Pride of Derby and Derbyshire Angling Association Ld.
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damages, and that it was not right or proper that the court, in the exercise of its discretion, should enjoin the corporation against further continuing the nuisance which they are causing. Sir Andrew Clark, in the course of his argument before us on this point, said that he was prepared, if necessary, to contend that no injunction should ever be granted against a local authority by reason of the public services which it is their duty to render. If that contention were to be accepted, the result would be not only to confer on local authorities a privilege which is enjoyed by no other section of the community, but one which, so far as I am aware, has never been accorded by the courts to any person or body of persons since the equitable remedy of injunction was devised. For my part, I am quite unable to accept the contention, and can find no possible warrant for it.

Anyone who creates an actionable nuisance is a wrongdoer, and the court will prima facie restrain him from persisting in his activities. If special circumstances be shown, the court may leave the injured party to his remedy in damages, but, in my judgment, the mere fact in itself that the wrongdoer is a local authority (however important) has never been, and ought not now to be, regarded as a circumstance of this character. Local authorities have great and important duties to discharge, and the court, in deciding what order it should make, would undoubtedly take those duties into consideration, and would no more make an order that was virtually impossible for an authority to perform than it would order a private individual to perform an act which it was not in his power to do. Accordingly, it would be quite wrong in the present case to grant an injunction against the corporation which was to take immediate effect, nor have the plaintiffs ever suggested that such an order should be made.

Why, however, no injunction should be granted at all—with the result, I suppose, that the plaintiffs would be compelled to bring one action after another for damages in the future—I am wholly at a loss to see. The proper course to adopt (and one which has been adopted on innumerable occasions in the past) is that which was taken by Harman J. and which my Lord has indicated, namely, to grant an injunction, but to suspend its operation for a reasonable time with liberty to the defendants to apply for a further suspension in the event of circumstances rendering it necessary for such an application to be made.

It would be as well, however, for the members of the corporation to bear very clearly in their minds that a further suspension of the injunction will by no means be granted automatically, but only on their satisfying the judge (and the onus will be wholly upon them) that they have in all sincerity done all that is reasonably within their power to remedy the grievous injury which they are inflicting on the plaintiffs, but that, notwithstanding their efforts, they have been unable to comply fully with the order which has been made against them.

In my view, therefore, the appeal of the corporation fails.

As to the appeal of the British Electricity Authority, I entirely agree with what the Master of the Rolls has said, and with the order which he has proposed.

Appeal of Derby Corporation dismissed.
Form of injunction against the British Electricity Authority varied.

Solicitors: *Sharpe, Pritchard & Co., for E. H. Nichols, Town Clerk, Derby; R. A. Finn; Marchant, Gerrish & Newington; Linklaters & Paines.*

B. A. B.

In re A JUDGMENT SUMMONS (No. 25 OF 1952). *Ex parte* HENLEYS LD.

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Jan. 12, 26.

Evershed M.R., Jenkins and Morris L.JJ.

Debt — Judgment debt — Extortion — Costs wrongly demanded — Bankruptcy petition dismissed—Judgment summons based on same debt —Jurisdiction to make order—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act,* 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 107 (4).

On April 25, 1951, judgment was given against a debtor for a sum which, with costs, amounted to £449. A bankruptcy notice was served in respect of that debt and was withdrawn upon the terms of an immediate payment of £100, the balance to be paid by monthly instalments of £50. After the first £100 had been paid, the creditors' solicitors exacted from the debtor's solicitors payment of 12 guineas in respect of the additional costs of the bankruptcy notice, which were not lawfully due, as a condition of withdrawing the bankruptcy notice. The debtor having failed to keep up the instalments a bankruptcy petition, pursuant to a further bankruptcy notice, was presented against him. That petition was dismissed on May 2, 1952, by the registrar on the ground that the demand and payment of the 12 guineas costs was not justified by the bankruptcy notice and constituted extortion. There was no appeal against that order. The debtor having made no further payments, a judgment summons was issued on August 8, 1952, in respect of the same debt.

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Harman J. dismissed the summons, holding that, though he had jurisdiction to make an order under section 5 of the Debtors Act, 1869, he was bound, as a matter of discretion, to exercise that jurisdiction as he would exercise the jurisdiction in bankruptcy, and that he must hold that the extortion which had barred a petition in bankruptcy also barred a judgment summons. On appeal:—

Held, first, that the dismissal of the bankruptcy petition on the ground of extortion did not have the effect of extinguishing the judgment debt, but merely disqualified the judgment creditors from presenting a bankruptcy petition founded upon it. They still had a valid unsatisfied judgment in payment of which the debtor had made default. Prima facie, therefore, the judge had jurisdiction to make an order under section 5 of the Debtors Act, 1869. Unless and until converted into bankruptcy proceedings properly so called by an order under section 107 (4) of the Bankruptcy Act, 1914, proceedings under section 5 of the Debtors Act, 1869, were wholly distinct and different from bankruptcy proceedings in nature, object and effect. The administrative links between proceedings under the two Acts did not afford sufficient reason for holding that circumstances which disqualified a creditor from presenting a bankruptcy petition automatically precluded him from proceeding under section 5 of the Act of 1869.

Held, secondly, that, in the exercise of the discretion conferred by section 5 of the Act of 1869, the court was not bound to refuse to entertain proceedings at the instance of a judgment creditor merely because a bankruptcy petition presented by him in respect of the same debt had been, or in the view of the court would have been, dismissed on the ground of "extortion" in the sense in which that expression was used in bankruptcy cases.

Semble, the disqualification of a judgment creditor on the ground of extortion from presenting a bankruptcy petition founded upon a given judgment debt would not necessarily preclude the court from making a receiving order in lieu of committal under section 107 (4) of the Bankruptcy Act, 1914, on a Debtors Act judgment summons issued in respect of the same debt.

In re Shaw, Ex parte Gill (1901) 83 L.T. 754 and *In re a Debtor* (*No.* 883 *of* 1927) [1928] Ch. 199 considered.

Decision of Harman J., ante, p. 1; [1952] 2 T.L.R. 681; [1952] 2 All E.R. 772 reversed.

APPEAL from Harman J.[1]

Judgment creditors on November 16, 1951, issued a bankruptcy notice against their debtor in respect of a judgment debt for £449 16s. 6d. That bankruptcy notice was withdrawn on the terms that the debtor should pay £100 forthwith and the balance by monthly instalments of £50 each. After the sum of £100 had been paid, the creditors' solicitors required the debtor to pay 12 guineas costs. That sum was paid under protest. Subsequently, the debtor having made default in the instalments, the creditors issued a further bankruptcy notice and a bankruptcy petition was presented against the debtor founded on that notice. The registrar dismissed the petition on the ground that the demand for costs, as a condition for the withdrawal of the first bankruptcy notice, amounted to "extortion." There was no appeal from that decision. The judgment creditors then issued a judgment summons against the debtor under section 5 of the Debtors Act, 1869, in respect of the unpaid balance of their judgment debt. Harman J. dismissed the summons on the ground that, since the creditors were precluded from taking bankruptcy proceedings, he ought, in the exercise of his discretion, not to make an order under the Act of 1869.

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[1] Ante 1.

The creditors appealed.

Patrick O'Connor for the judgment creditors. It is submitted that Harman J. was wrong in exercising his discretion on the footing that he should follow the course adopted in the bankruptcy proceedings. There is no link between the Bankruptcy Act, 1914, and the Debtors Act, 1869, other than the procedural link, that jurisdiction under both Acts has been assigned to the same judges. There is a fundamental difference between the powers of the court under the two Acts. The purpose of the Debtors Act, 1869, is punitive. The Act is not one intended for the debtor's protection or for that of any person to whom he may owe money. Proceedings in bankruptcy on the other hand are for the protection of all persons to whom the debtor owes money, including the petitioning creditor. On the authorities an unsuccessful demand for any unauthorized payment may be sufficient to prevent proceedings in bankruptcy. The requirement in this case that 12 guineas costs should be paid is only technically "extortion." If Harman J. is right, it is impossible for a creditor to take proceedings under the Debtors Act, 1869, if he has been guilty of any fault, however trivial, which prevents him taking bankruptcy proceedings.

The wording of section 5 of the Debtors Act, 1869,[2] shows

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[2] Debtors Act, 1869, s. 5: "Subject "to the provisions hereinafter men- "tioned, and to the prescribed rules, "any court may commit to prison for "a term not exceeding six weeks, or "until payment of the sum due, any "person who makes default in pay- "ment of any debt or instalment of "any debt due from him in pursuance "of any order or judgment of that or "any other competent court: Pro- "vided—(1) that the jurisdiction by "this section given of committing a "person to prison shall, in the case

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that, in considering whether to make an order, the court cannot look outside the provisions of that Act. Subsection (2) of section 5 shows the limits of the jurisdiction. In exercising this jurisdiction, the court must consider the conduct of the debtor; that of the creditor does not arise for consideration: see *Stonor* v. *Fowle.*[3] The decision in *In re Clark*[4] shows that the jurisdiction under the Act of 1869 is not fettered by any need to regard the principles applicable to the jurisdiction in bankruptcy.

The principle laid down in *In re a Debtor,*[5] that any extortion on the part of a creditor prevents him taking proceedings in bankruptcy, should not be applied to proceedings under the Act of 1869. In bankruptcy any extortion by one creditor is to the disadvantage of other creditors. That principle does not apply here. For proceedings to be taken under section 5 of the Debtors Act, 1869, the creditor must have obtained a judgment. It cannot be that a creditor, whose solicitors have been guilty of a technical mistake, should be precluded from enforcing his judgment.

Claud Duveen for the debtor. It is in the discretion of the judge whether he makes an order under section 5 of the Debtors Act, 1869, or not. Harman J. treated the matter as one of discretion and the Court of Appeal should not interfere with the manner in which he exercised his discretion since there is nothing to show that it was exercised on a wrong principle. The judge was entitled to consider the circumstances in which the creditors' application was made. It is submitted that *In re Clark*[6] is no longer an accurate statement of the law. The law has been altered by section 107 of the Bankruptcy Act, 1914.[7] The effect

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"of any court other than the superior "courts of law and equity, be exer-"cised only subject to the following "restrictions; that is to say . . . ; "(2) That such jurisdiction shall only "be exercised where it is proved to "the satisfaction of the court that the "person making default either has or "has had since the date of the order "or judgment the means to pay the "sum in respect of which he has "made default, and has refused or "neglected, or refuses or neglects, to "pay the same."

[3] (1887) 13 App.Cas. 20.

[4] [1898] 1 Q.B. 20; 14 T.L.R. 7.

[5] [1928] Ch. 199.

[6] [1898] 1 Q.B. 20.

[7] Bankruptcy Act, 1914, s. 107: "(1) It shall be lawful for the Lord "Chancellor by order to direct that "the jurisdiction and powers under "section 5 of the Debtors Act, 1869, "now vested in the High Court, shall "be assigned to and exercised by the "judge to whom bankruptcy business "is assigned. . . . (4) Where, under "section 5 of the Debtors Act, 1869, "application is made by a judgment "creditor to a court having bank-"ruptcy jurisdiction, for the committal "of a judgment debtor, the court may, "if it thinks fit, decline to commit, "and in lieu thereof, with the consent "of the judgment creditor, and on "payment by him of the prescribed

of subsection (4), giving the court power to make a receiving order instead of a committal order, is that a committal order cannot now be made in a case where a receiving order could not be made.

If *In re Clark*[8] is still good law, it is submitted that that decision is of no assistance in this case. Where the creditor has been guilty of extortion, the judge has no power to make a receiving order under section 107 (4). To refuse to make an order under section 5 of the Debtors Act, 1869, will not prevent the creditors enforcing their debts by any other method of execution. It would be wrong to make a committal order, where a creditor has behaved as these creditors have behaved.

Patrick O'Connor in reply. The kind of impropriety of which these creditors have been guilty is not of so serious a character as to shut them out from all bankruptcy proceedings. They could prove for their debt in bankruptcy proceedings begun by other creditors. There is nothing in section 107 (4) to prevent a receiving order being made in circumstances such as these. The jurisdiction of the court is not ousted by the creditors' misconduct. It is submitted that an application under the Act of 1869 should not be prejudiced by bankruptcy proceedings. A debtor, who has the means to pay a judgment debt, should not be able to escape from the provisions of section 5.

Cur. adv. vult.

January 26. The following written judgments were delivered:

EVERSHED M.R. I will ask Jenkins L.J. to deliver the first judgment.

JENKINS L.J. This is an appeal from an order of Harman J. dated October 20, 1952, dismissing a judgment summons under section 5 of the Debtors Act, 1869, issued against the debtor on the application of the judgment creditors in respect of £290 3s. 11d., being the unsatisfied balance of a judgment debt and costs amounting to £449 16s. 6d.

The judgment debt in question had previously been the subject of abortive proceedings by the judgment creditors against

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"fee, make a receiving order against "the debtor. In such case the judgment debtor shall be deemed to have "committed an act of bankruptcy at "the time the order is made, and the "provisions of this Act, except Part "VII thereof, shall apply as if for "references to the presentation of a "petition by or against a person there "were substituted references to the "making of such a receiving order."

[8] [1898] 1 Q.B. 20.

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the debtor in bankruptcy, and the issue in the appeal is, in effect, whether the judge was right in holding, as he did, that in view of the course and outcome of those proceedings he ought not in the exercise of his discretion to entertain the judgment creditors' application under the Debtors Act, 1869, in respect of the same debt.

The judgment to which the summons related was dated April 25, 1951, and remained wholly unsatisfied on November 16, 1951, when a bankruptcy notice in respect of it was served by the judgment creditors upon the debtor. The service of this bankruptcy notice was followed by negotiations between the parties, the upshot of which was that the judgment creditors agreed to withdraw it upon terms that the debtor should pay £100 forthwith and the balance of the debt by monthly instalments of £50 payable on December 1, 1951, and thereafter on the first of each calendar month until the whole amount was satisfied. These terms were offered on behalf of the judgment creditors by a letter from their solicitors to the debtor's solicitors dated November 20, 1951, which concluded: "If your client accepts the proposition "we shall be glad to receive cash for £100 or a draft or your "cheque by return, and confirmation that the monthly arrange- "ment will be adhered to."

That offer was accepted on behalf of the debtor by his solicitors on the following day (November 21, 1951), both orally and by a letter enclosing their cheque for the initial payment of £100. On November 22, 1951, the judgment creditors' solicitors replied acknowledging the debtor's solicitors' cheque and insisting upon the introduction into the bargain embodied in the two earlier letters of the following new term: "We must also insist that "our additional costs of the bankruptcy notice and these "arrangements be paid by your client, and as we have had to "instruct Messrs. Flowerdews to serve and we have incurred "expense thereby in addition to the expense of preparing and "issuing the bankruptcy notice and the subsequent correspon- "dence with you, our costs will be 12 guineas which must be "added to the amount of the debt." To this new demand the debtor's solicitors replied on November 23, 1951, enclosing the 12 guineas with the following comment: " . . . as our client "cannot afford to commit an act of bankruptcy or run the risk "of having a bankruptcy petition presented against him, it is with "great reluctance that we enclose you cash for the 12 guineas "demanded by you in the last paragraph of your letter."

In the course of the hearing before us it was argued (though, perhaps, somewhat faintly) on behalf of the judgment creditors that, inasmuch as the agreement for payment of the debt by instalments was concluded before the demand for the 12 guineas costs was made, the payment of that sum by the debtor was a purely voluntary payment forming no part of the conditions on which the bankruptcy notice of November 16, 1951, was withdrawn.

I cannot accept this argument. It is plain from the debtor's solicitors' letter of November 23, that they regarded the debtor as having no option but to comply with the demand for the 12 guineas if he was to stave off the prospect of being after all made bankrupt on a petition by the judgment creditors. It is also plain from the peremptory terms of the demand for the 12 guineas contained in their letter of November 22, that this was precisely the impression which the judgment creditors' solicitors intended to produce, or, in other words, that they were using the threat of bankruptcy proceedings based on the notice of November 16 as a means of exacting payment of the 12 guineas. The threat having been successfully applied, it can hardly lie in the mouths of the judgment creditors to say that the payment was a purely voluntary payment on the part of the debtor, inasmuch as the threat was an empty one which could not have been carried into execution in view of the agreement previously reached for payment of the debt by instalments. It may be that this agreement, which outside bankruptcy would have been a mere nudum pactum from which the judgment creditors could have resiled at any time, might have been relied on by the debtor as a compounding for the judgment debt to the satisfaction of the judgment creditors within the meaning of section 2 of the Bankruptcy Act, 1914, and as constituting accordingly a compliance with the notice of November 16; but it was clearly not so treated by either side when the additional demand for the 12 guineas was made and acceded to, and, if the point had been raised at the time on behalf of the debtor, it would, I think, have been at least open to argument.

In my view, therefore, the matter must be judged on the footing that, as a condition of withdrawing the bankruptcy notice of November 16, the judgment creditors exacted from the debtor 12 guineas in respect of costs which were not lawfully due from him.

The debtor failed to pay the instalment of £50 due on January 1, 1952, and the judgment creditors served on him a second bankruptcy notice in respect of that amount, erroneously described as the balance of the judgment. The debtor complied with that notice, but once more failed to pay the instalment due on February 1, upon which second default the judgment creditors served upon him a third bankruptcy notice in respect of the whole balance of the judgment debt and costs. The debtor failed to comply with that third notice, and a bankruptcy petition founded upon that failure was presented against him by the judgment creditors.

The petition was resisted on the part of the debtor on the ground that the exaction of the 12 guineas costs, as a condition of the withdrawal of the first bankruptcy notice, amounted to "extortion" within the meaning of the authorities hereinafter referred to, and therefore, in accordance with those authorities, disqualified the judgment creditors from founding a bankruptcy petition upon the debt to which the offending bargain related.

This objection was upheld by the registrar, who, on May 2, 1952, dismissed the petition with costs. The papers before us include no note of the registrar's reasons for his decision, but it is not in dispute that this was the ground on which he proceeded. The rule applied by the registrar is well-established so far as proceedings in bankruptcy are concerned. There have been numerous decisions bearing upon it, but I only find it necessary to refer to two of them.

In *In re Shaw* [1] a creditor had fraudulently proposed to the debtor that he (the creditor) should consent to a composition offered by the debtor to his creditors, the debtor secretly paying him the balance of his debt. This fraudulent scheme was rejected by the debtor, and thus frustrated. It was nevertheless held in the Court of Appeal (reversing a decision of the Divisional Court) that the creditor who had made the dishonest proposal (albeit without success), had by his conduct disqualified himself from presenting a petition founded upon the act of bankruptcy constituted by the debtor's declaration of his insolvency at the meeting of creditors at which the composition had been offered; such conduct constituting "sufficient cause" for refusing a receiving order within the meaning of section 7 (3) of the Bankruptcy Act, 1883. The petition had been presented jointly by the offending creditor and an innocent one, but inasmuch as the debt owing to each of them taken alone was below the statutory minimum of £50, the innocent creditor could only succeed if the offending creditor was entitled to do so.

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[1] (1901) 83 L.T. 754.

The facts in *In re Shaw* [1] were, of course, widely different from those in the present case, but the following passages from the judgment of Rigby L.J. are of assistance [2]: "The question "therefore, and I think the sole question in substance in this "appeal, is whether the other creditor, Gill, has so conducted "himself that he has no right in accordance with the rule in "bankruptcy to avail himself of an act of bankruptcy committed "on July 23, 1899, that act of bankruptcy being a declaration "of insolvency made at a meeting of creditors, or whether he "has, within the meaning of cases that have already been "decided or according to the principle on which those cases have "been decided, precluded himself from relying upon that act of "bankruptcy. Now, it was admitted, and could not be denied, "that if a creditor goes to his debtor and says: 'You owe me so "'much, I can proceed in bankruptcy against you; you will not "'like that; pay me something extortionate, something alto-"'gether beyond what you owe me at law, or I will file a "'petition,' that petition cannot be made the basis of a receiving "order; and very properly, for though the petition itself will "only be that which is within the right, so far as there is a "right, of a creditor, and will only have the effect of distributing "the property according to the rules of bankruptcy, yet the "previous conduct of the creditor would make it plain that he "was using, or attempting to use, the bankruptcy proceedings "as the means of unduly extorting what was not due to him. "Now, the fact of the proposed fraud is not in any way denied, "but certain suggestions are made which I must altogether "repudiate. I am not going in any way to assume that because "a man has proposed or even carried out a fraud he is to be "deprived of rights which he has at law in general. I do not "suggest that Phillimore J. was rather hasty in using the word "'outlaw'; but no one proposes to make the person concerned "an outlaw at all. The only question is whether, after what "he did under the circumstances in which he did it, he has a "right to present a petition against Shaw founded on an act of "bankruptcy committed at the meeting of July 23, or, perhaps "I may add, whether he can give any further right than he "would have had to Sutcliffe, the other petitioner. I say he "could not . . . It is not necessary to bring the case within "that doctrine that the petition should actually have been "presented at the time the fraud is attempted. If in the same

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[1] (1901) 83 L.T. 754.

[2] Ibid. 755.

"transaction the fraud has been attempted, I think that a debt "which has been used as a means of extortion cannot afterwards "be made use of as a means of getting a receiving order. That "being so, I do not think we have any discretion but to reverse "the decision of the Divisional Court and to restore matters "to the position in which they were left by the registrar when "he refused to make a receiving order."

Somewhat nearer in its facts to those of the present case is the decision of this court of *In re a Debtor* (*No.* 883 *of* 1927).[3] The petitioning creditors in that case had obtained judgment against the debtor for £500 and costs in respect of a dishonoured cheque. They had also obtained judgment with costs against other parties in related litigation, for which last-mentioned costs the debtor was plainly in no way liable. The petitioning creditors presented a bankruptcy petition against the debtor founded upon his non-compliance with a bankruptcy notice in respect of the judgment for £500 and costs. Negotiations ensued, in the course of which the petitioning creditors offered to consent to the dismissal of their petition upon terms that the debtor should pay £100 in reduction of the judgment debt of £500, should provide the guarantee of a specified individual in respect of the balance, and should pay as between solicitor and client the whole of the costs not only of the action against him, but also of the related action against other parties, the amount of all such costs being put at £160. The debtor did not accede to the whole of those demands, but he did make payments on account of £50 and £144 15s. 4d., of which latter sum £94 15s. 4d. was in respect of solicitor and client costs, so that £100 only out of those two payments went in reduction of the judgment debt of £500. Agreement was later reached for payment of the balance of £400 by instalments, but the debtor made default in payment of the instalments agreed, and the petitioning creditors served a further bankruptcy notice and presented a further petition in respect of the balance of the debt.

That second petition was opposed on behalf of the debtor on the ground that the petitioning creditors' demands for the payment by him as between solicitor and client of costs for which he was only liable as between party and party, and for the payment by him as between solicitor and client of costs for which he was not liable at all, amounted to extortion. It should be noted that while the costs actually extracted from the debtor in excess of the amount properly due came in the result to only £15, being the difference between solicitor and client and party and party costs of the action against him, the petitioning creditors had attempted to make him pay in respect of costs no less than £160 as compared with a legitimate claim amounting to no more than some £80. The court upheld the debtor's objection. In the course of the judgments the earlier authorities, including *In re Shaw*,[4] were reviewed. Lord Hanworth M.R. said[5]: "As I "have already said, the debtor ought to be made a bankrupt, "and in the ordinary course the receiving order would have been "a perfectly right order to be made by the registrar; but there "is a principle which must be jealously guarded—namely, that "the process of the Bankruptcy Court must not be abused. A "number of cases have established that. In *In re Otway*[6] the "petitioning creditor endeavoured to obtain £25 from a debtor as "a condition for agreeing to adjournment of the petition. The "attempt failed; but although the petitioning creditor did not "succeed the court held that he had attempted to extort money "from the debtor for his own purposes, and it declined to allow "him to have the advantage of using the process of the court in "bankruptcy against the debtor. That is a case where an unsuccessful attempt was made, and yet the creditor was debarred "from making use of bankruptcy proceedings." And later he said[7]: "It is said here that all that was done was that some £15 "was obtained from the debtor in respect of costs which he did "not owe, costs which were the difference between party and "party costs and solicitor and client costs. That is not an "accurate way of putting it; the attempt was to obtain not only "those costs but also a further sum of £160 in respect of costs "which the debtor had no concern with at all. The whole "principle of bankruptcy is that when an act of bankruptcy has "been committed there shall be a fair distribution between all "the creditors, and it is for that reason that the title of the "trustee relates back to the earliest act of bankruptcy; and thus "where in *Ex parte Edwards*[8] payments were made as the price "of an adjournment to the petitioning creditor's solicitor, and he "paid them away to the petitioning creditor and agreed to the "adjournment, he was held liable to replace the money, as what "had been done gave an advantage to the particular creditor,

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[3] [1928] Ch. 199.

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[4] 83 L.T. 754.
[5] [1928] Ch. 199, 206.
[6] [1895] 1 Q.B. 812.
[7] [1928] Ch. 199, 208.
[8] (1884) 13 Q.B.D. 747.

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"which would not be shared on the basis of equality in bankruptcy proceedings." Finally he said [9]: "In these circumstances, it appears to be quite impossible that the court should allow the misuse of its procedure by saying that a receiving order ought to be made in this case. The case falls within the Bankruptcy Act, 1914, s. 5 (3), as being one where the court is satisfied that for sufficient cause no order ought to be made."

Sargant L.J. said [10]: "I now come to what appears to me to be the ground on which the appeal succeeds. It relates to the action of the petitioning creditor in obtaining a sum of £15 in excess of the costs to which he was legally entitled, and, what is much more important, the attempt to obtain £160 for costs as between solicitor and client in respect of a matter for which the debtor was in no way liable. To my mind, that was a demand which comes within the phrase 'extortion,' as it has been used in the cases to which the Master of the Rolls has referred and to which I will not refer again." Later he said: "To my mind the attempt to obtain so large a sum as £160 for costs due from some other person for which the debtor could not by any stretch of imagination be deemed to be personally liable, was a very strong instance of an attempt to use bankruptcy proceedings—the threat of bankruptcy—for the purpose of obtaining a collateral advantage unconnected with the bankruptcy for the benefit of the petitioning creditor. It is said that the possible defect in the proceedings was cured, because the petition on which adjudication was asked for was a subsequent petition commenced after the sum of £15 had been provided and the demand for £160 refused. To my mind, looking at the facts in this case, I think there is such a connexion between the two petitions by the same creditor against the same debtor, with the debt alleged in the second petition increased by the treatment of this sum of £15 as part of what was due and remained due from the debtor, that the circumstance that the material petition is a subsequent petition and not the original petition makes no real difference. The petition seems to me to be tainted just as in *In re Shaw*,[11] and to a very aggravated extent, having regard to the large amount of the sum sought to be added to the liability of the debtor."

Lawrence L.J. said [12]: "It cannot, in my opinion, be too clearly understood that bankruptcy proceedings, which are in

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[9] [1928] Ch. 199, 209.

[10] Ibid. 209, 210.

[11] 83 L.T. 754.

[12] [1928] Ch. 199, 211-212.

"their nature quasi criminal, must not be used for the purpose "of obtaining a collateral advantage. An attempt to do so, even "though unsuccessful, will be sufficient to disentitle a petitioning "creditor to an order, and, therefore, the fact that in the present "case the debtor refused to pay the costs of the Sherbourne Trust, "Ld., and that that demand was not insisted upon, does not "absolve the petitioning creditors from the consequences of "having made that demand. The principle upon which the "court acts in these cases is that it treats a demand of this "nature as evidence that bankruptcy proceedings were taken not "with the bona fide intention of obtaining adjudication but for "some collateral purpose."

It may be observed that the bargains held "extortionate" in *In re Shaw*[13] and *In re a Debtor*[14] both had reprehensible features going far beyond anything to be found in the present case, the former involving actual fraud and the latter a demand for costs which could not unfairly be characterized as "extortionate" in the ordinary sense of the expression. The bargain in the present case was not fraudulent nor, viewed without regard to the authorities, could it to my mind fairly be described as "extortionate" in the ordinary sense. That is not to say, however, that it may not have been in a technical sense "extortionate" within the meaning attributed to that expression by the authorities, and as such obnoxious to the well-established rule. For the present purpose I find it unnecessary to express any concluded opinion one way or another on this aspect of the case. The registrar held in the bankruptcy proceedings that the bargain here in question did infringe the rule. There has been no appeal from his decision, and for the purposes of the present proceedings between the same parties it must, in my view, be taken as conclusively established that the bargain was extortionate within the meaning of the rule, and accordingly had the effect of disqualifying the judgment creditors from taking any proceedings in bankruptcy founded upon the debt to which it related.

Upon the dismissal of their petition on the ground of "extortion," the judgment creditors procured the issue of the summons under section 5 of the Debtors Act, 1869, to which the present appeal relates, in respect of the unpaid balance of their judgment debt. Before Harman J. what was called a preliminary objection to the jurisdiction of the court was taken on behalf of the debtor, to the effect that the dismissal of the judgment

[13] 83 L.T. 754.

[14] [1928] Ch. 199.

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creditors' petition on the ground of extortion, which disqualified them from presenting any further petition in respect of the same debt, deprived the court of jurisdiction to entertain at their instance a summons under section 5 of the Debtors Act, 1869, in respect of the debt in question.

The formal order of October 20, 1952, recites the preliminary objection to the jurisdiction, declares the court to " uphold the " said preliminary objection " and dismisses the summons.

This is unfortunate, for the judge, while deciding in favour of the debtor, was at pains to explain in his judgment that he did so not as a matter of jurisdiction but as a matter of discretion. The concluding paragraph of his judgment is in these terms [15]: " It seems to me that I am bound to hold that this act "—that is to say, the demand and the receipt of the 12 guineas—" is one " of which the court of bankruptcy, in its bankruptcy jurisdiction, " would disapprove. It seems to me that I ought logically to " exercise the jurisdiction under section 5 of the Debtors Act, " 1869, in the same sense, and to hold that the vice which would " debar a petition in bankruptcy also bars a judgment summons. " In that case, it is not, I think, that I have no jurisdiction to " make this order, as it was submitted to me, but that, in the " exercise of my discretion, guided by the analogy of the bankruptcy authorities which are binding on me, I ought to hold " that this is a relief to which the creditors have disentitled " themselves, and I so hold. I, therefore, dismiss the summons." Earlier in his judgment he had discussed the bankruptcy rule in regard to " extortion," and expressed agreement with the registrar's view that the demanding of the 12 guineas amounted to " extortion " within the meaning of the rule, while acquitting the judgment creditors or their solicitors of any " moral obloquy " in the matter. I think that the judge was right in holding that the so-called " preliminary objection " went to the discretion, not the jurisdiction of the court, and before us the argument on behalf of the debtor was mainly directed to the question of discretion. But in view of the form of the order, and as both aspects of the case were canvassed in the course of the hearing of the appeal, I think that I should deal with both in this judgment.

The alleged want of jurisdiction, in my view, clearly cannot be substantiated. The Debtors Act, 1869, s. 5, provides: " Subject to the provisions hereinafter mentioned, and to the " prescribed rules, any court may commit to prison for a term

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[15] Ante 1, 6.

"not exceeding six weeks, or until payment of the sum due, any "person who makes default in payment of any debt or instalment "of any debt due from him in pursuance of any order or judgment of that or any other competent court." Then the second proviso provides: "That such jurisdiction shall only be exercised "where it is proved to the satisfaction of the court that the "person making default either has or has had since the date of "the order or judgment the means to pay the sum in respect of "which he has made default, and has refused or neglected, or "refuses or neglects, to pay the same. Proof of the means of "the person making default may be given in such manner as the "court thinks just; and for the purposes of such proof the debtor "and any witnesses may be summoned and examined on oath, "according to the prescribed rules." Then later: "For the "purposes of this section any court may direct any debt due from "any person in pursuance of any order or judgment of that or "any other competent court to be paid by instalments, and may "from time to time rescind or vary such order."

The dismissal of the petition on the ground of extortion plainly did not have the effect of extinguishing the judgment debt, but merely disqualified the judgment creditors from presenting a bankruptcy petition founded upon it. They still had a valid unsatisfied judgment in respect of which they could have proved in any bankruptcy of the debtor brought about by the petition of some creditor other than themselves, and outside bankruptcy they could still avail themselves of any remedy in the way of execution against the property of the debtor open to them as unsatisfied judgment creditors.

It follows, in my view, that at the time when the summons was issued, and at the time when it came before the judge, there was still in existence an effective judgment in pursuance of which a debt was due from the debtor to the judgment creditors, and in payment of which debt the debtor had made default, within the meaning of section 5 of the Act of 1869. Prima facie, therefore, the judge had jurisdiction under the Act, if he thought fit to do so, to make an instalment order, and also (subject to proof to his satisfaction of the debtor's means to pay in accordance with proviso (2) to section 5) to make an order for committal.

The main argument against this conclusion consists in the contention that the procedure under section 5 of the Debtors Act, 1869, is only available in respect of a judgment or order on which the judgment creditor might have founded a petition in bankruptcy, and that in view of the dismissal on the ground of

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extortion of the petition founded on the present judgment debt, and its consequent disqualification as the foundation of any subsequent petition in bankruptcy by the judgment creditors, the judgment debt here in question does not answer that description.

This contention turns on section 107 (4) of the Bankruptcy Act, 1914, which provides: "Where, under section 5 of the "Debtors Act, 1869, application is made by a judgment creditor "to a court having bankruptcy jurisdiction for the committal of "a judgment debtor, the court may, if it thinks fit, decline to "commit, and in lieu thereof, with the consent of the judgment "creditor and on payment by him of the prescribed fee, make a "receiving order against the debtor. In such case the judgment "debtor shall be deemed to have committed an act of bankruptcy "at the time the order is made, and the provisions of this Act "except Part VII thereof shall apply as if for references to the "presentation of a petition by or against a person there were "substituted references to the making of such a receiving order."

According to the argument I am now stating, this provision has the effect of confining the operation of section 5 of the Act of 1869 to cases in which, independently of section 107 (4) of the Act of 1914, a receiving order might have been made at the instance of the judgment creditor, if he had proceeded by way of petition in bankruptcy, and not by way of summons under section 5 of the Act of 1869.

I do not agree. In the first place, I think that the words "may if it thinks fit" in section 107 (4) are wide enough to enable the court to have regard to all relevant circumstances, including the question whether the debt is one on which a bankruptcy petition might properly have been founded, and that the subsection is therefore not incompatible with the position that there may be some debts which can properly be made the subject of proceedings under section 5 of the Act of 1869, although they would not have been available for the purpose of founding a bankruptcy petition. Secondly, non constat that the power conferred by section 107 (4) is limited to cases in which a receiving order could have been made independently of that provision (see *In re Clark*[16] (Court of Appeal)). Thirdly, I am not satisfied that the disqualification of a judgment creditor on the ground of "extortion" from presenting a bankruptcy petition founded upon a given judgment debt would necessarily preclude the court from making a receiving order in lieu of committal on a Debtors Act summons issued on his application in respect of the same debt, for such a receiving order is made by the court of its own motion in the interests of the debtor (see *In re Clark* [16]) and not at the instance of the judgment creditor, although it can only be made with his consent. Finally, this argument seems to me inconsistent with *In re Otway*,[17] where it was held that an order for payment of alimony pendente lite could be the subject of proceedings under section 5 of the Debtors Act, 1869, although the sum ordered to be paid was not a judgment debt in respect of which a receiving order could be made under section 103 (5) of the Bankruptcy Act, 1883 (corresponding to section 107 (4) of the Bankruptcy Act, 1914).

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[16] [1898] 1 Q.B. 20.

A further argument, which perhaps goes to the discretion rather than to the jurisdiction of the court, is to the effect that an application under section 5 of the Debtors Act, 1869, is a form of proceeding in bankruptcy, and that the court would stultify itself if, after disqualifying a judgment creditor from presenting a bankruptcy petition on the ground of extortion, it admitted the same creditor to a different form of relief in bankruptcy in respect of the same debt. It is no doubt true that there are certain administrative links between the two forms of proceeding. The jurisdiction of the High Court under section 5 of the Act of 1869 (except in relation to orders of the Divorce Division) is assigned to the judge in bankruptcy; the Bankruptcy Rules include provisions in regard to proceedings under the Act of 1869; and proceedings under that Act may be converted into proceedings in bankruptcy by an order under section 107 (4) of the Act of 1914. On the other hand, the jurisdiction under section 5 of the Act of 1869 with respect to orders of the Divorce Division is assigned to that division, which, of course, has no jurisdiction in bankruptcy; and there are county courts without jurisdiction in bankruptcy to which jurisdiction under section 5 of the Act of 1869 is nevertheless assigned. Moreover, unless and until converted into bankruptcy proceedings properly so called by an order under section 107 (4) of the Act of 1914, proceedings under section 5 of the Act of 1869 are wholly distinct and different from bankruptcy proceedings properly so called in nature, object and effect; and I see no sufficient reason in the administrative links to which I have referred for holding that circumstances held sufficient to disqualify a creditor from maintaining the latter should automatically also disqualify him from maintaining the former.

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[16] [1898] 1 Q.B. 20.

[17] (1888) 5 Morr. 115; 58 L.T. 885; 4 T.L.R. 489.

In my view, therefore, the objection based on jurisdiction fails.

As to the submission that the judge was right to refuse to entertain the summons in the exercise of his discretion, I have no doubt that the jurisdiction under section 5 of the Debtors Act, 1869, is discretionary, nor would I dispute that there may be cases in which the conduct of a judgment creditor has been such as to make it right for the court, in the exercise of its discretion, to refuse him any assistance under that section. But the proposition here is, in effect, that whenever it is shown that the judgment creditor has presented a bankruptcy petition in respect of the same debt and such petition has been dismissed on the ground that he has been guilty of " extortionate " conduct in the sense in which that expression is used in the authorities above referred to, or, indeed, whenever the court is apprised of conduct on the part of the judgment creditor which would in bankruptcy proceedings have been held to amount to extortion in that sense, the court ought, in the exercise of its discretion, to refuse his summons under section 5 of the Act of 1869, without considering whether the conduct in question was in fact such as to make it unfair, oppressive, or unconscionable to allow him to proceed under that section. This proposition seems to me untenable. As I have said, the two forms of proceeding are wholly different in nature, object and effect. The object of proceedings in bankruptcy is to make the debtor's assets available for rateable distribution amongst his creditors. No creditor is entitled to have recourse to such proceedings for the purpose of obtaining some collateral advantage for himself. Moreover, the threat of bankruptcy, with the deprivation of property and status which it involves, may be a potent instrument of oppression and of " extortion " in no mere technical sense. These, in effect, are the considerations dwelt on in the authorities to which I have referred, and they amply account for the strictness of the rule against " extortion " which has been laid down and firmly maintained by the courts in bankruptcy, and for the penalty for breach of that rule which it has been found necessary to provide in the shape of disqualification from founding any subsequent bankruptcy proceedings upon any debt in relation to which a charge of " extortionate " conduct has been made good.

To proceedings under section 5 of the Debtors Act, 1869, wholly different considerations apply. In such proceedings the questions for the court are in effect: (i) Is there a judgment or order against this debtor for the payment of money in respect of which he is in default? If so, (ii), has he now, or has he since the date of the judgment or order, had means to pay the amount in respect of which he is in default? If so, (iii), has he refused or neglected, or does he now refuse or neglect, to pay such amount? And finally, (iv), given affirmative answers to the three preceding questions, is there any sufficient reason why he should not be committed to prison by way of punishment for such refusal or neglect? In practice the court in the first instance almost invariably makes an order for payment by instalments estimated to be within the means of the debtor, and only proceeds to committal in the event of the debtor refusing or neglecting to pay the instalments and being proved to have, or to have had at the relevant time, the means to pay them. It is no doubt true that from the judgment creditor's point of view the summons affords a means of enforcing payment of his debt; but in law the issue is not whether the court should take measures to enforce payment of the debt for the benefit of the judgment creditor, but whether (on proof of means and default) the judgment debtor merits punishment in the form of committal for his refusal or neglect to comply with the judgment or order. The function of the judgment creditor is to bring the facts to the notice of the court. Once that is done, the issue is between the court and the debtor.

That being, as I understand it, the nature of proceedings under section 5 of the Debtors Act, 1869, why should the court be constrained, in the exercise of its discretion under the section, to refuse to entertain such proceedings at the instance of a judgment creditor merely because a bankruptcy petition presented by him in respect of the same debt has been, or in the view of the court would have been, dismissed on the ground of "extortion" in the sense in which that expression is used in the bankruptcy cases? There is certainly nothing in the cases to suggest that the disqualification consequent on "extortionate" conduct extends beyond proceedings in bankruptcy, so as to apply to proceedings of a wholly different nature, such as those under section 5 of the Debtors Act, 1869, or that any conduct which would be deemed "extortionate" in bankruptcy should by analogy disqualify a judgment creditor from making any application under that section. I see no sufficient reason for such extension or analogous application and reject it as unwarranted by principle or authority.

It should be borne in mind that, as appears from the cases to which I have referred, and, indeed, from the present case, there may be " extortionate " conduct in the bankruptcy sense, even though the collateral benefit obtained is trifling in comparison with the amount of the debt, and, what is more, even though there was no more than an attempt at " extortion " which in fact resulted in no advantage at all.

If the court is bound in the exercise of its discretion under section 5 of the Debtors Act, 1869, to treat the existence of a disqualification in relation to proceedings in bankruptcy (actual or potential) on account of " extortionate " conduct on the part of the judgment creditor, as extending to proceedings under that section, the extraordinary result would ensue that a judgment debtor summoned under section 5 could say to the court (in effect): " It is true that there is an unsatisfied judgment against " me for £500; it is true that I have ample means to pay; but " I do not choose to pay, and you, in the exercise of your discretion, must not order me to pay or commit me to prison for " not doing so, because the judgment creditor served me with a " bankruptcy notice in respect of this debt, and offered to withdraw it on my undertaking to pay in addition to the debt £25 " for costs for which I was not legally liable. In fact, I gave " no such undertaking, and paid him nothing; but the bankruptcy petition founded upon that notice, which he later " presented, was dismissed on the ground that his offer amounted " to extortionate conduct. You must therefore let me go scot-free." To bring the example nearer home, the registrar's decision in the present case should in principle have been the same, and, on the view of the matter taken by the judge, he would (as he himself in effect recognized) have been equally constrained to dismiss the summons in the exercise of his discretion, if the 12 guineas had been merely demanded and never in fact paid.

In the absence of authority requiring me to do so, I decline to subscribe to a view of the law which is capable of producing such results.

For the reasons I have stated, I think that the judge was wrong in holding, as I understand him to have done, that the mere fact that there had been conduct on the part of the judgment creditors which amounted to extortion within the meaning of the bankruptcy rule obliged him to exercise his discretion adversely to them.

I would therefore allow the appeal and remit the case to the judge in bankruptcy to be dealt with on the merits. What account (if any) should be taken of the £12 12s. 0d. (for example, by deducting it from the unpaid balance of the judgment for the purposes of any instalment order made) is entirely a matter for him, as to which I say nothing.

MORRIS L.J. For the purposes of the present appeal it can be assumed, though it need not be decided, that the demand which was made for the sum of £12 12s. 0d., which was in fact followed by the payment of that sum, should be regarded as an "extortion" within the meaning of that word as it has been used in bankruptcy law when considering whether a receiving order should be made.

Section 5 (3) of the Bankruptcy Act, 1914, provides: "If "the court is not satisfied with the proof of the petitioning "creditor's debt, or of the act of bankruptcy, or of the service "of the petition, or is satisfied by the debtor that he is able to "pay his debts, or that for other sufficient cause no order ought "to be made, the court may dismiss the petition."

In *In re a Debtor* [18] it was held that there would be sufficient cause to satisfy the court that no receiving order ought to be made if extortion amounting to an abuse of the process of the court was shown to have taken place or to have been attempted. Lord Hanworth M.R. said [19]: ". . . but there is a principle "which must be jealously guarded—namely, that the process of "the Bankruptcy Court must not be abused. A number of cases "have established that. In *In re Otway* [20] the petitioning "creditor endeavoured to obtain £25 from a debtor as a condition "for agreeing to adjournment of the petition. The attempt "failed; but although the petitioning creditor did not succeed "the court held that he had attempted to extort money from the "debtor for his own purposes, and it declined to allow him to "have the advantage of using the process of the Court in Bank"ruptcy against the debtor. That is a case where an unsuc"cessful attempt was made, and yet the creditor was debarred "from making use of bankruptcy proceedings." In the earlier case of *In re Shaw* [21] Rigby L.J. said: "If in the same trans"action the fraud has been attempted, I think that a debt which "has been used as a means of extortion cannot afterwards be "made use of as a means of getting a receiving order."

Though in the present case the judge negatived any conclusion that the demand made involved any moral obloquy, I proceed upon the assumption that the court would not make a receiving order based upon a petition in respect of the debt owing to the creditors. But the debtor, who does not contend that any merits march with the point he takes, submits that because the debt has been used as a means of what the Bankruptcy Court has felt obliged to regard as an "extortion," the court should not afterwards allow such a debt to be the basis of an application under section 5 of the Debtors Act, 1869. It is apparently further submitted that the court will not lend its aid for the recovery of the debt by any means which can only be invoked by leave of the court. This seems to me to involve some sort of notion that the debt has become tainted for all occasions when the contact of the court with it demands any exercise of discretion. But the debt represents the balance of what the court has adjudged to be due, and the concern of the court must be to assist a creditor to obtain just satisfaction by all proper means. Because those who acted for the creditors, all unwittingly (as the judge held), brought about the position that a bankruptcy petition could not now successfully be presented, is the court to be fettered in coming to a conclusion on an application under section 5 of the Debtors Act, 1869? Though the judge did not uphold a contention that he had no jurisdiction, he did hold, as I read his judgment, that he was obliged to refuse relief. He said [22]: "It is "not, I think, that I have no jurisdiction to make the order on "the summons, as was submitted to me, but, in the exercise of "my discretion and guided by the analogy of bankruptcy autho-"rities which are binding on me, I ought to hold that this is a "relief to which this creditor has disentitled himself, and I so "hold. I therefore dismiss the summons." The view formed by the judge made it unnecessary for him to hear evidence on whether the debtor had or had had since the judgment the means to pay the debt due from him. If the judge had been satisfied that there had been wilful default on the part of the debtor, he would yet have felt obliged to decline to make an order.

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[18] [1928] Ch. 199.

[19] Ibid. 206.

[20] [1895] 1 Q.B. 812.

[21] 83 L.T. 754, 755.

It is common ground that the point now raised is a novel one and that there is no reported authority on the subject. That being so, it seems to me that there is nothing which precludes the creditors from invoking the procedure of section 5 of the Debtors Act, 1869, and nothing which need fetter or limit or pre-dispose the exercise by the court of the discretion vested in it by section 5 when all the evidence is available and examined and when all the facts and circumstances are considered.

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[22] Ante, 1, 6.

It was not suggested that the creditors will be denied such a remedy as the issue of a writ of fieri facias. It seems to me to be strange and illogical if the creditors may have the general assistance of the court but must inevitably be denied it in any form which may require the active exercise of a discretion. Though the court will jealously and zealously guard against any abuse of process, and though the creditors have placed themselves by their own action in difficulties so far as the Court of Bankruptcy is concerned, yet a debt remains which the court has adjudged to be due, and the court must be concerned to see that there is no wilful and deliberate failure or refusal to comply with its orders. I can see no let or hindrance to the operation of, and the applicability of, the Debtors Act, 1869, and I am not persuaded that reasoning compels the view that the creditors have disentitled themselves from having a judgment summons heard. I would therefore allow the appeal.

EVERSHED M.R. I also am of the same opinion. For the reasons which have been stated by my Lords, I do not think, by reason of the procedural affinity which exists between bankruptcy proceedings on the one hand and proceedings under the Debtors Act, 1869, on the other, including the terms of section 107 (4) of the Bankruptcy Act, 1914, that where circumstances exist which would be regarded as extortion in bankruptcy proceedings and would accordingly disqualify the petitioning creditors from obtaining a receiving order in respect of their debt, it therefore follows that the jurisdiction of the court under the Debtors Act, 1869, must be exercised by refusing relief to the petitioning creditors in respect of the same debt.

I also agree with Jenkins L.J. that the question whether the sum of 12 guineas ought or ought not, wholly or in part, to be deducted for any purpose from the amount of the debt now owing is a matter for the discretion of the judge when the present summons comes to be re-heard.

I think that the appeal must be allowed.

Appeal allowed.

Solicitors: *Hewitt, Woollacott & Chown; Isadore Goldman & Son.*

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Nov. 4, 5, 6,
7, 12, 13,
14, 24, 25;
Dec. 17.

Evershed M.R.,
Denning and
Romer L.JJ.

In re DOWNSHIRE SETTLED ESTATES; MARQUESS OF DOWNSHIRE *v.* ROYAL BANK OF SCOTLAND.

[1952 D. No. 1122.]

In re CHAPMAN'S SETTLEMENT TRUSTS; CHAPMAN *v.* CHAPMAN.

[1952 C. No. 2828.]

In re BLACKWELL'S SETTLEMENT TRUSTS; BLACKWELL *v.* BLACKWELL.

[1952 B. No. 3247.]

Trust—Scheme of family arrangement intended to save duty—Modification of beneficial rights—Inherent equitable jurisdiction of the court—Jurisdiction to sanction a compromise—Statutory jurisdiction—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 64—*Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 57.

First, it is not an objection to the sanction by the court of any proposed scheme in regard to trust property that its object or effect is, or may be, to reduce liability for tax (including estate duty).

Secondly, *per* Evershed M.R. and Romer L.J., Denning L.J. dissenting. The inherent jurisdiction of the Court of Chancery is of a limited character. It is a jurisdiction to confer upon trustees quoad items of trust property vested in them administrative powers to be exercised by them where a situation has arisen in regard to the property creating what may fairly be called an "emergency." The inherent jurisdiction does not extend to sanctioning generally the modification or remoulding of the beneficial trusts of a settlement. To that general principle there are only two exceptions: (1) where a testator or settlor has so provided, particularly by way of a trust for accumulation, that the immediate beneficiaries have no fund for their present maintenance, the court will assume that the intention to provide, sensibly, for the family is so paramount that it will order maintenance in disregard of the trusts for accumulation; (2) the court has power and jurisdiction to approve on behalf of persons interested under the trusts who are under disability (particularly infants) and persons who may hereafter become interested, compromises proposed by or between persons beneficially interested under the trust who are sui juris, and to direct and protect trustees accordingly. The word "compromise" in this connexion should not be narrowly construed so as to be confined to "compromises" of disputed rights.

Thirdly, *per* Evershed M.R. and Romer L.J. Section 57 of the Trustee Act, 1925, does not confer on the court any general jurisdiction to vary beneficial trusts. The power conferred by that section in regard to "the management or administration of any "property" is confined to the managerial supervision and control of trust property on behalf of beneficiaries, and the language cannot be stretched to include any modification of equitable interests which have been created in that property.

Fourthly, *per* Evershed M.R. and Romer L.J. The jurisdiction conferred by section 64 of the Settled Land Act, 1925, is in some respects more ample in regard to the subject-matter to which it relates than the jurisdiction conferred by section 57 of the Trustee Act, 1925. The power conferred by section 64 to authorize "any "transaction" which in the opinion of the court would be for the benefit of the settled land is not limited to steps of an administrative character. The test imported by the qualification that the transaction should affect or concern the settled land is satisfied by transactions indirectly as well as directly operating upon the settled land, provided that in the former case the effect is real and substantial by ordinary common-sense standards as distinct from that which is oblique or remote and merely incidental.

Semble that in the case of a settlement under the Settled Land Act, 1925, which no longer comprises any land, neither section 64 of the Settled Land Act, 1925, nor section 57 of the Trustee Act, 1925, has any application.

In re C. W. M. [1951] 2 K.B. 714; [1951] 2 All E.R. 707, considered.

In re New [1901] 2 Ch. 534 and *In re Tollemache* [1903] 1 Ch. 457 considered and explained.

In re Trenchard [1902] 1 Ch. 378 approved.

In re Salting [1932] 2 Ch. 57, *In re Mair* [1935] Ch. 562 and *In re White-Popham Settled Estates* [1936] Ch. 725 considered.

By a settlement of 1915, in the events which had happened, land was settled to uses under which the plaintiff had, in effect, a protected life interest, with remainder to his sons in tail (there were none), with remainder to the second defendant for life, with remainder to the third defendant absolutely. The trust property was valued at over £1,100,000, of that sum £400,000 being represented by land and the balance of £700,000 by investments. With a view to saving estate duty on the tenant for life's death, the court was asked to sanction a scheme of arrangement by which the plaintiff would surrender his life interest in the £700,000 capital moneys and the second defendant his reversionary life interest so as to accelerate the life interest of the remainderman, on the footing that the surrender of the plaintiff's life interest should not involve a forfeiture. Powers to jointure and charge portions in respect of the £700,000 investment fund were to be released. Provision was to be made for the contingency of the plaintiff having a son, and there were other ancillary provisions. Roxburgh J. held that he had no jurisdiction to sanction the scheme. On appeal:—

Held, first, that the court had no jurisdiction to sanction the scheme under its general jurisdiction. The scheme, however, fell

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within the court's jurisdiction to approve compromises and should be approved. Secondly, that the scheme was for the benefit of the persons interested in the settled land in that it would, if the tenant for life lived five years, relieve the settled land from death duties which might cause the settled properties to be broken up. The scheme was a "transaction" for the benefit of the persons interested under the settlement and was one which the court could, and ought, to approve under the statutory jurisdiction conferred by section 64 of the Settled Land Act, 1925.

Decision of Roxburgh J. sub nom. *In re D.'s Settled Estates* [1952] W.N. 428; [1952] 2 T.L.R. 483; [1952] 2 All E.R. 603 reversed.

By a settlement of 1944 a trust fund was settled for the benefit of the settlor's son, and it was provided by clause 3 that until his youngest child should attain 25 years or until the expiration of 21 years from the death of the survivor of the settlors the trust income should be applied at the discretion of the trustees as a common fund for the maintenance of the son's children and the balance accumulated, with ultimate trusts for the son's children. Two subsequent settlements contained similar provisions. By reason of the provisions of clause 3 it was apprehended that a claim for estate duty might arise on the respective deaths of the settlors. The court was asked under section 57 of the Trustee Act, 1925, to sanction a scheme to free the trust funds from the provisions of clause 3 under which the trust funds were to be transferred to the trustees of a new settlement to be held upon the trusts of the original settlements but without the clause in question. Harman J. held he had no jurisdiction to sanction the scheme. On appeal:—

Held (Denning L.J. dissenting), that the scheme was outside section 57 of the Trustee Act, 1925. The only way in which the scheme could be brought within the jurisdiction of the court was to show that it involved a compromise. The scheme did not constitute a composition of rights in any sense at all. It was nothing more than a rearrangement of beneficial interests which, to the extent that it might prove to be of advantage to some members of the class would correspondingly operate to the prejudice of others. It was no part of the function of the courts to recast settlements from time to time merely with a view to tax avoidance, even if they had power to do so, which in fact they had not. The court had no jurisdiction to authorize the trustees to carry the scheme into effect.

Decision of Harman J. affirmed.

By a voluntary settlement made in 1933 the plaintiff settled a trust fund, in effect, on protective trusts on himself for life, with remainder for his children and issue as he should appoint and, in default of appointment, for his children in unequal shares, with an ultimate trust for his testamentary appointees. The plaintiff had one son born in 1951. The settled fund was valued at £83,000. On the plaintiff's death estate duty would be payable at the rate of 65 per cent. The plaintiff asked the court to sanction a scheme whereby he surrendered his life interest in half the settled fund, so as to accelerate the interests in remainder upon the terms that his life interest in the other half of the fund was not thereby forfeited. Roxburgh J. held that he had no jurisdiction to sanction the scheme. On appeal:—

Held, that the scheme was of a nature which the court had power to sanction in exercise of its jurisdiction to approve compromises in the wide sense of the word.

Decision of Roxburgh J. sub nom. *In re B.'s Settlement Trusts* [1952] W.N. 429; [1952] 2 T.L.R. 489; [1952] 2 All E.R. 647 reversed.

THESE three appeals were heard together.

The first appeal, in *In re Downshire Settled Estates*, was from a decision of Roxburgh J.[1]

The facts in the first case were as follows: By a resettlement dated September 23, 1915, made between the sixth Marquess of Downshire of the first part, the plaintiff, who became the seventh Marquess of Downshire, of the second part, and trustees of the third part, the Downshire settled estates were resettled to uses under which the estates were held, in effect, upon protective trusts for the benefit of the plaintiff for life, with remainder to his sons in tail, with remainder to the plaintiff's brother, the second defendant Arthur Francis Henry Hill, for life, with remainder to his sons in tail. The plaintiff had never been married. The second defendant had one son, the third defendant Arthur Robin Iain Hill, who had duly disentailed. The resettlement contained the usual powers to jointure and charge portions for younger children. Its terms are more fully stated in the judgment of Evershed M.R.

The plaintiff by this summons, which was headed "In the "Matter of the Settled Land Act, 1925," asked that he and the first defendant, the Royal Bank of Scotland, as the trustees of the resettlement, might be at liberty to execute such documents and do such acts as might be necessary for bringing into operation a scheme of family arrangement and so that, from and after bringing the scheme into operation, it might be binding on all persons interested in the property subject to the trusts of the resettlement of September 23, 1915.

The scheme, which the court was asked to sanction, was one whereby the plaintiff surrendered his life interest in capital moneys valued at £700,000, while not forfeiting his life interest in the land which constituted the remainder of the settled property. The scheme is stated in detail in the judgment of Evershed M.R.

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[1] [1952] W.N. 428; [1952] 2 T.L.R. 483; [1952] 2 All E.R. 603.

The purpose of the scheme was to save estate duty in the event of the plaintiff surviving five years.

Roxburgh J. dismissed the application, holding that the proposed scheme involved a rewriting of the trusts of the settlement under which the estates were held and that the court had no jurisdiction to sanction such a rewriting either under its general jurisdiction or under section 64 of the Settled Land Act, 1925.[2]

The plaintiff appealed. The defendants did not oppose the appeal and on the suggestion of the Court of Appeal counsel appeared on behalf of the Attorney-General to argue the case as amicus curiae.

Raymond Jennings Q.C. and *J. A. Brightman* for the plaintiff. All that the plaintiff is asking the court to do is to remove the restrictions resulting from his life estate being held, in effect, on protective trusts, so that he may be in a position to do what any good parent would do and release his life interest with a view to capital being paid to those who are entitled subject to his life interest, so that, should he live for five years, estate duty may be saved on his death. It is clear that there is no principle which prevents the court sanctioning a scheme on behalf of infants which is designed to save duty. It sanctioned such a scheme in *In re C. W. M.*[3] in the case of a lunatic.

Our first submission is that the court has jurisdiction to sanction this scheme under its general equitable jurisdiction. It is of no assistance to consider the authorities before *In re New*,[4] where the inherent jurisdiction of the court was reviewed. It is said that it appears from that decision that the general equitable jurisdiction of the court does not extend to rearranging beneficial interests, but is limited to sanctioning, in case of emergency, the taking by the trustees of administrative steps in relation to the trust property not authorized by the trust instrument.

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[2] Settled Land Act, 1925, s. 64 (1): "Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorized by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner."

Subs. (2): "In this section 'transaction' includes any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any application of capital money . . . and any compromise or other dealing, or arrangement. . . ."

[3] [1951] 2 K.B. 714.

[4] [1901] 2 Ch. 534.

In re New [4] was followed in *In re Tollemache.*[5] There has been no subsequent reported judicial decision on the general equitable jurisdiction of the court. It is submitted that the principle applied in *In re New* [6] cannot be limited to authorizing unauthorized applications of trust moneys. Every such application to some extent affects beneficial rights. The increase in the rate of estate duty since 1915 has been such as to create an emergency which brings this case within the principles of *In re New.*[6]

The alternative way of putting the plaintiff's case is that the court can sanction this scheme under its general equitable jurisdiction which empowers it to sanction compromises and family arrangements on behalf of infants: see *In re Wells.*[7] The proposed scheme is in fact a compromise. The plaintiff is offering to give up his life interest upon terms. [They referred to *In re Crawshay* [8] and *Brooke* v. *Lord Mostyn.*[9]]

The nature of discretionary trusts was considered in *In re Beckett's Settlement.*[10] The object of these trusts is similar to that of the restraint on anticipation. The court should find less difficulty in modifying the rights of persons under such trusts, since their interests are less than those of persons with actual or contingent interests.

Secondly, it is submitted that the court has jurisdiction to sanction this scheme under section 64 of the Settled Land Act, 1925. For that section to apply, the transaction must be one affecting the settled land which can be effected by the tenant for life: *In re White-Popham Settled Estates.*[11] This transaction affects the settled land because, if it is not possible to effect a substantial saving in estate duty on the plaintiff's death, the estate will have to be sold. [They referred to *In re Scarisbrick Re-Settlement Estates* [12] and *In re Mount Edgcumbe (Earl of).*[13]]

While a single case decided in chambers is not an authority as to the jurisdiction of the court, a course of practice over a long period affords a strong authority as to the law. There have been a number of cases in chambers where the court has sanctioned a surrender by a tenant for life of a protected life interest. Such orders were sometimes made under the statutory jurisdiction, sometimes under the inherent jurisdiction. The court should take that practice into account.

[4] [1901] 2 Ch. 534.
[5] [1903] 1 Ch. 457.
[6] [1901] 2 Ch. 534.
[7] [1903] 1 Ch. 848.
[8] (1890) 43 Ch.D. 615.
[9] (1864) 2 De G.J. & S. 373.
[10] [1940] Ch. 279.
[11] [1936] Ch. 725.
[12] [1944] Ch. 229.
[13] [1950] Ch. 615.

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J. A. Brightman followed in the same interest. The only purpose of the decision in *In re White-Popham Settled Estates*[14] was to enable the tenant for life's debts to be paid. There it was held that the mortgage moneys could be handed over to the tenant for life.

The decision in *In re Trenchard*[15] is the nearest case to this under the inherent jurisdiction. There the tenant for life was paid an annuity for the surrender of her rights. Here the Marquess is to be paid a lump sum for surrendering his life interest in the capital moneys. [He referred to *In re Haynes.*[16]]

A consideration of section 57 of the Trustee Act, 1925, is relevant only if that section and section 64 are to be regarded as of similar effect.

L. M. Jopling for the trustees. I am concerned only for possible unborn issue of the plaintiff. If he lives five years the scheme will save the settled estates large sums for duty. What is done pursuant to an order of the court will not result in a forfeiture under protective trusts: *In re Mair.*[17]

Denys Buckley for the Attorney-General as amicus curiae. It is first submitted that this transaction does not fall within section 64 of the Settled Land Act, 1925. For section 64 to apply the transaction must be one "affecting or concerning the settled land" which is to be "effected" by a tenant for life. Accordingly, it must be a transaction which concerns the settled land in a physical sense; something in regard to the management of the land, not a transaction between beneficiaries. The definition of "transaction" in subsection (2) of section 64 must be read as qualified by subsection (1). There cannot be a transaction within the section unless it relates to the settled land. It has not been proved that this proposed transaction is for the benefit of the land. The settled land in England is valued at £28,000 and forms only a small part of the settled land, which is valued at £400,000. The bulk of the land is in Northern Ireland. Whether this scheme goes forward or not, the plaintiff will remain tenant for life of the land. The land is not affected. The fact that the scheme may save the settled land from a charge for duty is too remote for consideration. The amendments to section 64 effected by the Settled Land and Trustee Acts (Court's General Powers) Act, 1943, show that Parliament regarded section 64 as relating to the management of the land itself. Further, section 64 relates to transactions to be effected by a tenant for life. The proposed transaction is not one to be effected by the tenant for life except as regards the release of the powers of jointuring and charging portions. The transaction is to be carried into effect by the trustees.

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[14] [1936] Ch. 725.

[15] [1902] 1 Ch. 378.

[16] (1887) 37 Ch.D. 306.

[17] [1935] Ch. 562.

With regard to the inherent jurisdiction of the court. It is submitted that the scope of that jurisdiction is limited in the way stated in *In re New*.[18] It is not suggested that that case was wrongly decided. The general equitable jurisdiction is limited to the case of an emergency, to enable trustees to deal with some circumstance which was not foreseen by the settlor in relation to the administration of the trust property and which, if the trustees' powers were not extended, would result in hardship to the beneficiaries. There is no emergency here. The fact that the rate of estate duty might be increased must have been in the contemplation of the parties. [He referred to *D'Eyncourt* v. *Gregory*,[19] *Johnstone* v. *Baber*[20] and *In re Crawshay*.[21]]

It is submitted that in so far as *In re Trenchard*[22] is authority for the proposition that the court can sanction a scheme for compounding beneficial rights it is inconsistent with *In re New*[23] and was wrongly decided.

Jennings Q.C. in reply. It is submitted that *In re New*[23] does not show the limits of the court's inherent jurisdiction. The present case is within the principle applied in *In re Trenchard*.[24] That decision shows that the court has jurisdiction to sanction a compromise of rights where there is no dispute as to what they are. It is submitted that this proposed transaction can be sanctioned both under the power conferred by section 64 of the Settled Land Act, 1925, and under the court's general power. Section 64 expressly refers to "any other land." There is no reason for excluding from the section land out of England.

Cur. adv. vult.

The second appeal, in *In re Chapman's Settlement Trusts*, was from a decision of Harman J.

By the summons the trustees of three settlements made in 1944 and 1950 sought the approval of the court under section 57 of the Trustee Act, 1925,[25] to a scheme authorizing them to execute such documents as might be necessary to give effect to an arrangement whereby the trust funds would be resettled so as to be free from certain provisions conferring discretionary trusts for maintenance, which it was thought might give rise to a claim for estate duty on the death of the settlors. The terms of the settlements are sufficiently stated in the judgment of Evershed M.R.

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[18] [1901] 2 Ch. 534.

[19] (1876) 3 Ch.D. 635.

[20] (1845) 8 Beav. 233.

[21] 43 Ch.D. 615.

[22] [1902] 1 Ch. 378.

[23] [1901] 2 Ch. 534.

[24] [1902] 1 Ch. 378.

Harman J. dismissed the application, holding that the court had no jurisdiction, either under its general power or under section 57 of the Trustee Act, 1925, to sanction it.

The trustees appealed.

Neville Gray Q.C. and *J. A. Armstrong* for the trustees. This appeal raises similar questions to those considered by this court in *In re Downshire's Settled Estates*. In this case, however, the court is being asked only to authorize the trustees of the settlements in question to do on behalf of infants what they could do themselves if they were sui juris. It is submitted that the court has jurisdiction to sanction this application under section 57 of the Trustee Act, 1925. Here there is a real emergency. The estate duty which will be leviable in respect of these trust funds will be crippling on the death of the settlors if the court does not sanction the proposed scheme. The jurisdiction conferred on the court by section 57 is not limited to sanctioning transactions with regard to the management of the trust property.

If the court cannot sanction this scheme under section 57, it is submitted that the court can sanction it under its general jurisdiction. It is submitted that Kekewich J. did not mean to say in *In re Tollemache*[26] that the court had no jurisdiction to do what it was asked there to do. He treated the matter as one of discretion. The older authorities suggest that the court has a wide general jurisdiction. In the more recent decisions the court was not intending to lay down that it had no jurisdiction, but merely that in the circumstances then under consideration it would not in its discretion sanction the proposals submitted to it. In *In re Wells*[27] Farwell J. did make an order varying trusts. The court in the exercise of its general jurisdiction has stopped a trust for accumulation: *Havelock* v. *Havelock*[28] and *In re Collins*.[29]

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[25] Trustee Act, 1925, s. 57 (1): "Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income. (2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order. (3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust. (4) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925."

The early decisions in *Earl of Winchelsea* v. *Norcliffe*,[30] *Pierson* v. *Shore*[31] and *Inwood* v. *Twyne*[32] show that the court of equity did not regard its jurisdiction as limited in the way suggested in *In re New*.[33] That decision was but one example of the manner in which the court will exercise its general equitable jurisdiction. The court has power to look after infant's interests: see *Steed* v. *Preece*,[34] where there was a sale of land; and the court can always do what in the due exercise of a trust is thought proper. If the court were going to formulate a rule, it might distinguish between a special class and a general class in which the court thought a particular transaction was manifestly to the advantage of any person who was not sui juris.

In re Trenchard[35] is of interest in this regard. Here the infants should be allowed to say that there is something unforeseen which the settlors never intended and their intention fails only because of some words put in the settlement presumably by the draftsman. We are not really asking the court to vary the trusts. It is contended that the court should be regarded as having power to vary for the benefit of infants: compare *In re Collins*[36] and *In re Walker*.[37] The authorities on the subject go far back and *Revel* v. *Watkinson*[38] is the authority on which all later cases are based: see *Greenwell* v. *Greenwell*[39] and *In re Wells*,[40] a case of very high authority, where the extent of the court's jurisdiction was stated widely and most carefully. If necessary, we would ask the court to consider the jurisdiction in lunacy cases. It is submitted that the court has jurisdiction to do what is asked here, which is the wish of everyone who is sui juris and can hurt none. The Inland Revenue is raising no objection. [They referred to *In re Coe's Trusts*.[41]]

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[26] [1903] 1 Ch. 457.
[27] [1903] 1 Ch. 848.
[28] (1880) 17 Ch.D. 807.
[29] (1886) 32 Ch.D. 229.
[30] (1686) 1 Vern. 435.
[31] (1739) 1 Atk. 480.
[32] (1762) Amb. 417.
[33] [1901] 2 Ch. 534.
[34] (1874) L.R. 18 Eq. 192.
[35] [1902] 1 Ch. 378.
[36] 32 Ch.D. 229.
[37] [1901] 1 Ch. 879.
[38] (1748) 1 Ves.Sen. 93.
[39] (1800) 5 Ves. 194.
[40] [1903] 1 Ch. 848.

J. F. Bowyer for the infant beneficiaries. The court is not being asked to accede to anything more than was done in *In re Wells*.[42] This case is really covered by *Havelock* v. *Havelock*.[43] If the infants interested had attained 21 years of age they could carry out what the court is now being asked to sanction for the benefit of the infants.

Denys Buckley for the Attorney-General as amicus curiae. What the court is being asked to do here is far too wide for it to be done under the general jurisdiction. It has been contended that the court can vary the acts of those responsible for the settlement. It is clearly contrary to the statement of the law in *In re New*.[44] As I submitted in *In re Downshire's Settled Estates*, the court has no power to interfere in such a way. The court will not depart from the terms of a trust. It is submitted that the transaction which the court is asked to sanction is neither within the jurisdiction conferred by section 57 of the Trustee Act, 1925, nor within its general jurisdiction. Section 57 is limited to conferring on trustees powers in the nature of powers of management. *In re Morrison*,[45] when read with *In re New*,[46] shows that there is no general jurisdiction to sanction any scheme merely because it would be advantageous for the beneficiaries. For the court to intervene there must be something in the nature of an emergency. In cases such as *Havelock* v. *Havelock*,[47] where the court has allowed maintenance notwithstanding a trust for accumulation, the court is not rewriting the trusts but giving effect to what it considers was the settlor's intention. It presumes an intention to provide for the beneficiaries. The cases where the court has stopped a trust for accumulation are coloured by the fact that the court disapproves of trusts for accumulations. A general jurisdiction to rewrite settlements for the benefit of infants cannot be deduced from such cases. In *In re Wells* [48] the court was merely asked to sanction an act of management.

Here no emergency has been shown which would bring the principle in *In re New* [49] into operation. This is not a case of

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[41] (1858) 4 K. & J. 199.
[42] [1903] 1 Ch. 848.
[43] 17 Ch.D. 807.
[44] [1901] 2 Ch. 534.
[45] [1901] 1 Ch. 701.
[46] [1901] 2 Ch. 534.
[47] 17 Ch.D. 807.
[48] [1903] 1 Ch. 848.
[49] [1901] 2 Ch. 534.

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compromise within the principle of *In re Trenchard.*[50] If the compromise jurisdiction applies here, it applies to authorize the modification of all trusts.

Neville Gray Q.C. in reply. We rely on *In re Wells*[51] and *In re Trenchard*[52] as showing that the court has jurisdiction to sanction a scheme of this character. It is in essence a compromise and it being for the benefit of the infants the court should sanction it.

Cur. adv. vult.

The third appeal, in *In re Blackwell's Settlement Trusts*, was from a decision of Roxburgh J.[53]

By the summons the plaintiff, who was entitled to a protected life interest in certain funds under a voluntary settlement which he had made in 1933, applied under section 57 of the Trustee Act, 1925, for leave to give effect to a scheme of family arrangement whereby he surrendered his life interest in one-half of the settled funds without forfeiting his life interest in the other half. The effect of the scheme was to accelerate the interest of the plaintiff's only child, the object being to save duty on the plaintiff's death. The provisions of the settlement are more fully stated in the judgment of Evershed M.R. Roxburgh J. dismissed the application, holding that he had no jurisdiction to sanction it.

The plaintiff appealed.

J. A. Brightman for the plaintiff. The object of this application is to enable the plaintiff to surrender his life interest in half the settled fund. The only property dealt with by the scheme is the income arising during the settlor's life. Capital is not affected, except so far as an order may be made for payment of costs. The only persons interested are the settlor, his present and any future wife and children. The court is asked to sanction the proposed scheme either under the power conferred by section 57 of the Trustee Act, 1925, or under the court's inherent jurisdiction to sanction a compromise on the principle applied in *In re Trenchard.*[54] This is a compromise. The settlor offers to surrender his life interest in half the fund on terms. It is also submitted that the scheme can be sanctioned under section 57. In that section the phrase "management or administration" must mean more than "management": see *Municipal and General Securities*

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[50] [1902] 1 Ch. 378.
[51] [1903] 1 Ch. 848.
[52] [1902] 1 Ch. 378.
[53] [1952] W.N. 429.
[54] [1902] 1 Ch. 378.

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Co. Ld. v. *Lloyds Bank Ld.*[55] The trustees are to give up their discretion in respect of the income of the share released from the life interest. That is a matter which arises on the "administra-"tion" of the trusts. The transaction in question here is the release of the trustees' discretionary powers. After 20 years it would be undesirable to say that *In re Salting*[56] and *In re Mair*[57] were wrongly decided.

It is submitted that in the widest sense of the word the scheme is a "transaction." The court is not here asked to rewrite any trusts. It is asked only to accelerate the interests of the persons entitled after the tenant for life. This is a scheme the court should sanction.

G. A. Rink for the trustees. The only difficulty here is caused by the protective trusts. As regards what is proposed, it would be very beneficial to the infant beneficiaries. In the case of such a transaction the court has power to sanction it.

It is not sought to address the court as to the general jurisdiction of the court, as that has been done in the two other cases, but it is submitted that what the court is asked to do here is within the general jurisdiction. What is sought is a compromise by which the settlor and his wife give up their rights in exchange for their children receiving half fund.

The settlor is ready to surrender a very large interest if the scheme is carried out. The scheme was drafted with a view to bringing it within section 57 of the Trustee Act, 1925, but I should prefer to rely on the general jurisdiction of the court. There is undoubtedly power in the court to deal with the property of a lunatic for his benefit and that of his family. This was so in the case of a lunatic not so found before the Lunacy Act, 1890: *In re Mary Smith.*[58] It is suggested that there is the same power to deal with interests of unborn persons.

Denys Buckley for the Attorney-General as amicus curiae. It is important to have in mind what was the state of the law before the Act of 1925 was passed. The court's jurisdiction was limited to cases of emergency. The language of section 57 of the Act of 1925 conferring power on the court is inappropriate to giving the court power to remould trusts. It would not be expected that a section intended to confer such wide powers would refer to "sale, "lease, surrender, release or other dispositions" and not deal with the manipulation of the trusts of a settlement. It is true that the words "in the management or administration" are controlling words, but they have a clear meaning in regard to land. "Management" is a very appropriate word to apply to such things as repairing and leasing land, but when there is a sale of land forming part of the trust estate, that is not "management" but "administration." Nor can it be said that "administration" would apply to a manipulation of beneficial trusts. The acts to which section 57 applies are managerial acts altering the condition of trust property vested in trustees.

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[55] [1950] Ch. 212.
[56] [1932] 2 Ch. 57.
[57] [1935] Ch. 562.
[58] (1873) L.R. 10 Ch. 79.

It is impossible to say that section 57 conferred on the court the wide power contended for here. The same is true as to the power conferred on a tenant for life under the Settled Land Act, 1925, s. 64. *In re Salting* [59] went far but not so far as is sought to go here. Trustees cannot deprive themselves of their discretionary powers nor can the court do so for them. [He referred to *In re Basden's Settlement Trusts* [60] and *Municipal and General Securities Co. Ld.* v. *Lloyds Bank Ld.*[61]]

J. A. Brightman in reply.

Cur. adv. vult.

December 17. The following judgments were read:

EVERSHED M.R. The judgment which I am about to read, which is the judgment in all three cases, is the judgment of Romer L.J. and myself.

These three appeals are concerned with the exercise by Her Majesty's judges sitting in chambers in the Chancery Division of their useful and characteristic jurisdiction in relation to trusts. In each case the question raised has been of the extent of the jurisdiction; not of the discretion which in every case undoubtedly regulates the exercise of the court's powers, where the jurisdiction exists. The Court of Appeal has been required to review (for the first time for half a century) the extent of the court's inherent jurisdiction which was invoked in cases of this kind until the creation in 1925 of the statutory jurisdictions conferred by the Trustee Act, 1925, and the Settled Land Act, 1925. We have also been called upon to examine those statutory jurisdictions, contained respectively in section 57 of the former Act and section 64 of the latter.

In each of the three cases the judges from whom the appeals have come, Roxburgh J. in the first and third, and Harman J.

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[59] [1932] 2 Ch. 57.

[60] [1943] 2 All E.R. 11.

[61] [1950] Ch. 212; [1949] 2 All E.R. 937; 65 T.L.R. 744.

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in the second, held that the orders sought were beyond their jurisdiction, whether inherent or statutory, to make. The distinction is, no doubt, a fine one between saying "I have no jurisdiction to "make the order sought" and "Though jurisdiction exists, this "is not a case or a case of a kind in which the jurisdiction should "be exercised." But the distinction is there and is a real distinction. And, as we have said, in each of the present three cases, the decision of the judge took the form of the first of the two above alternatives. In none of the cases was there any purported exercise of discretion, nor did either of the judges intimate (as we understand the judgments) that, had he had jurisdiction, he would nevertheless in his discretion have refused to make the order asked.

The appeals raise, then, matters of considerable general importance affecting, as we have been told, and do not doubt, many other cases now, or likely to come, before the judges in the Chancery Division; and it is necessary that we should express our views upon the extent of the jurisdiction, inherent and statutory, at least so far as requisite for the decision of the three appeals. Upon these matters we have had the advantage of very full and careful arguments. Since in none of the cases was there any person or class of persons concerned to argue against the appellants' contentions, we thought it proper to suggest that counsel should be instructed on behalf of the Attorney-General to assist us as amicus curiae with such arguments as seemed to him proper. We are greatly indebted to Mr. Buckley, who appeared in each case in response to this suggestion.

We think it useful to preface our judgment with two general observations. The first is this: The Court of Chancery has over many centuries evolved in relation to its peculiar or "extra"ordinary" jurisdiction many salutary powers, including the "inherent jurisdiction" invoked in the present cases. It has not in general been the practice of the court to attempt precise definitions of such powers and thereby to run the risk of imposing undue fetters upon their future application. See, for example, *per* Lord Chelmsford L.C. in *Tate* v. *Williamson*,[1] in reference to the court's jurisdiction to give relief in cases of undue influence. In the present case we do not propose to depart from the well-established practice.

Our second general observation is of a different character. In each of the present cases a principal object of the scheme presented to the court has been to achieve (so far as foresight could achieve it) a limitation of the future liability of the corpus of the trust property to serious diminution from estate duty. The high rates of taxation, in the form both of income tax and of death duties, is a phenomenon of the present generation. It must be taken as notorious that many persons, having families and free estates, so dispose of their estates as to reduce, within the law, liability for income tax during their lives and for death duties upon their deaths; and in the recent case before this court of *In re C. W. M.*[2] a scheme for the settlement and disposition of the property of a person of unsound mind having for one of its main objects limitation of liability for death duties was approved by this court in the exercise of its statutory jurisdiction in regard to the property of persons under such disability. It follows, in our judgment, that it is not an objection to the sanction by the court of any proposed scheme in regard to trust property that its object or effect is or may be to reduce liability for tax (including death duties).

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[1] (1866) L.R. 2 Ch. 55, 60.

We turn now to the inherent jurisdiction of the court to authorize or direct trustees to participate in schemes such as the present. It was the argument of counsel for all the appellants (founded on Jeffrey L.C.'s case, *Earl of Winchelsea* v. *Norcliffe*,[3] and other early cases, including *Pierson* v. *Shore*[4] before Hardwicke L.C. and *Inwood* v. *Twyne*[5] before Northington L.C.) that the jurisdiction of the court to modify or vary trusts and to direct the trustees accordingly was unlimited provided: (1) that all persons interested who were sui juris assented, and (2) that it was clearly shown to be for the advantage or convenience of all persons interested who were not sui juris, including persons unborn or not presently ascertainable; in other words, that the court has unlimited jurisdiction in relation to the property of infants, including the beneficial interests of infants and unborn cestuis que trustent under a settlement, and will exercise that jurisdiction so as to secure any benefit or advantage for the infants or unborn persons, which they could have themselves secured had they been in esse and sui juris, even to the extent of sanctioning a departure from the beneficial trusts of the trust instrument from which the interests in question are derived.

In our judgment, such a broad and general jurisdiction is inconsistent with the two decisions of this court in 1901 and 1903, never, so far as we are aware, subsequently qualified or criticized, namely, *In re New*[6] and *In re Tollemache.*[7] On the contrary, one thing is, we think, clear: just as the court has always insisted on the due and proper observance by trustees of the terms of their trusts, so also will it in its own orders depart as little as possible from the strict letter of the trust instrument. An example of this is to be found in the cases in which the court has empowered trustees to invest trust funds in unauthorized securities: in such cases it is (as we believe) the invariable rule to insert in the order a time limit for retention, which will only be extended by the court itself upon further application. The general rule, as we have said, is that the court will give effect, as it requires the trustees themselves to do, to the intentions of a settlor as expressed in the trust instrument, and has not arrogated to itself any overriding power to disregard or re-write the trusts. (See, for example, *D'Eyncourt* v. *Gregory*[8]; *Johnstone* v. *Baber.*[9]) There have been cases in which the court has made orders which did undoubtedly result in a departure from the trusts declared by the settlor; in our opinion, however, these cases did not establish new rules but only exceptions to the general rule.

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[2] [1951] 2 K.B. 714.
[3] 1 Vern. 435.
[4] 1 Atk. 480.
[5] Amb. 417.

Thus, the earlier cases already mentioned establish that in regard to property belonging beneficially to an infant, including "property" of all kinds, the court has power to direct persons in whom such property is vested (as trustees) or persons having the management of such property (as guardians) on the infant's behalf respectively, so to deal with the property as will be in the infant's best interests. But it is not, in our judgment, legitimate (in the light of *In re New*[10] and *In re Tollemache*[11]) to proceed thence to the conclusion that the court has an unlimited jurisdiction where property is subject to trusts under which classes, for example, consisting of infants or unborn or unascertainable persons, are interested, to authorize and direct trustees to participate in or give effect to schemes modifying or "remoulding" the trusts, because it is shown that the trusts so modified or "remoulded" will be, or are likely to be, for the better advantage of such classes.

In our judgment (but without departing from the principle stated in our first general observation above) the inherent jurisdiction, or the aspect of the jurisdiction invoked in *In re*

[6] [1901] 2 Ch. 534.
[7] [1903] 1 Ch. 457.
[8] 3 Ch.D. 635.
[9] 8 Beav. 233.
[10] [1901] 2 Ch. 534.
[11] [1903] 1 Ch. 457.

New [12] and sought to be invoked in these appeals, is of a more limited character. It is a power or jurisdiction to confer upon trustees, quoad items of trust property vested in them, administrative powers to be exercised by them as the persons in whom the property is vested (notwithstanding that such powers were not conferred by the trust instrument) where a situation has arisen in regard to the property (particularly a situation not originally foreseen) creating what may be fairly called an " emergency "—that is a state of affairs which has to be presently dealt with, by which we do not imply that immediate action then and there is necessarily required—and such that it is for the benefit of everyone interested under the trusts that the situation should be dealt with by the exercise of the administrative powers proposed to be conferred for the purpose. The power or jurisdiction does not, in our view, extend to changes or re-arrangements of the beneficial interests inter se under the trust, as distinct from re-arrangements or reconstructions of the trust property itself.

In *In re New* [12] the power desired for the trustees was a power to enable them, as holders of certain shares, to concur in a proposed reconstruction of a mercantile company—a thing shown to be advantageous to those beneficially interested under the trusts and liable to be incapable of achievement without concurrence on the trustees' part. We cite two passages from the report of the case and of the judgment of the court delivered by Romer L.J. The first is taken from the argument, where Romer L.J. interjected to observe [13]: " The principle seems to be " this—that the court may, on an emergency, do something not " authorized by the trust. It has no general power to interfere " with or disregard the trust; but there are cases where the court " has gone beyond the express provisions of the trust instru-" ment—cases of emergency, cases not foreseen or provided for " by the author of the trust, where the circumstances require " that something should be done." The second is the passage from the judgment of the court [14]: " As a rule, the court has " no jurisdiction to give, and will not give, its sanction to the " performance by trustees of acts with reference to the trust " estate which are not, on the face of the instrument creating " the trust, authorized by its terms. The cases of *In re* " *Crawshay*,[15] decided by North J., and *In re Morrison*,[16] decided " by Buckley J., are instances where the court was asked to

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[12] [1901] 2 Ch. 534.

[13] Ibid. 543.

[14] Ibid. 544.

[15] [1888] W.N. 246, 251.

[16] [1901] 1 Ch. 701; 17 T.L.R. 330.

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"sanction steps to be taken by trustees which it thought unjusti-
"fiable, and which it declared it had no jurisdiction to authorize.
"But in the management of a trust estate, and especially where
"that estate consists of a business or shares in a mercantile
"company, it not infrequently happens that some peculiar state
"of circumstances arises for which provision is not expressly
"made by the trust instrument, and which renders it most
"desirable, and it may be even essential, for the benefit of the
"estate and in the interest of all the cestuis que trustent, that
"certain acts should be done by the trustees which in ordinary
"circumstances they would have no power to do. In a case of
"this kind, which may reasonably be supposed to be one not
"foreseen or anticipated by the author of the trust, where the
"trustees are embarrassed by the emergency that has arisen and
"the duty cast upon them to do what is best for the estate, and
"the consent of all the beneficiaries cannot be obtained by reason
"of some of them not being sui juris or in existence, then it may
"be right for the court, and the court in a proper case would
"have jurisdiction, to sanction on behalf of all concerned such
"acts on behalf of the trustees as we have above referred to.
"By way merely of illustration, we may take the case where a
"testator has declared that some property of his shall be sold
"at a particular time after his death, and then, owing to unfore-
"seen change of circumstances since the testator's death, when
"the time for sale arrives it is found that to sell at that precise
"time would be ruinous to the estate, and that it is necessary
"or right to postpone the sale for a short time in order to effect
"a proper sale: in such a case the court would have jurisdiction
"to authorize, and would authorize, the trustees to postpone the
"sale for a reasonable time. It is a matter of common know-
"ledge that the jurisdiction we have been referring to, which is
"only part of the general administrative jurisdiction of the court,
"has been constantly exercised, chiefly at chambers. Of course,
"the jurisdiction is one to be exercised with great caution, and
"the court will take care not to strain its powers. It is impos-
"sible, and no attempt ought to be made, to state or define all
"the circumstances under which, or the extent to which, the
"court will exercise the jurisdiction; but it need scarcely be said
"that the court will not be justified in sanctioning every act
"desired by trustees and beneficiaries merely because it may
"appear beneficial to the estate; and certainly the court will not
"be disposed to sanction transactions of a speculative or risky
"character."

It was contended before us that the judgment of this court in *In re New*[17] and the passages which we have quoted do not qualify, but are merely illustrative of, the broad generality already formulated and sought to be derived from the earlier cases. We have been unable to accept this argument. It is true that the jurisdiction invoked and exercised in *In re New*[17] was stated by Romer L.J. to be a part of the general administrative jurisdiction of the court. But that is not the same thing. The argument is for a general power, not to administer trusts but (where it is shown to be advantageous so to do) to override them. And the argument is, in our judgment, inconsistent with the later case of *In re Tollemache*.[18] In that case what was sought was (in effect) power to enable the tenant for life to enjoy a larger income by empowering the trustees to acquire—as the relevant trusts did not permit them to do—a mortgage of the tenant for life's interests, a transaction which (it was claimed) could not prejudice the remaindermen. The application was refused by Kekewich J. His judgment contained an elaborate analysis of the jurisdiction based on previous authority, including *In re New*.[19] One citation will, for present purposes, suffice. After referring to certain instances, he said[20]: " The above are illustra-" tions of the exercise by the court, justified by the practical " necessity of the case, of jurisdiction going beyond the mere " administration of trusts according to the terms of the instru-" ments creating them. Others might be given, the applications " or rather the circumstances inducing them exhibiting large " varieties, but those mentioned suffice to explain the scope of " the practice of the court. There might be added illustrations " of the refusal of the court to exercise this extraordinary juris-" diction, but there is no occasion. All the cases of refusal may " be grouped under one of two classes. Either, notwithstanding " the advantage actual and prospective of what is proposed to be " done, there is no urgency for it, and the existing state of things " may without great mischief be allowed to remain, or the terms " on which the advantage can be gained are such that the court " would by accepting them create a new trust in lieu of that " which it is administering."

The brief judgments of this court dismissing the appeal are an affirmation of the reasoning of Kekewich J. and they should be cited in full. Vaughan Williams L.J. said[21]: " It is admitted

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[17] [1901] 2 Ch. 534.
[18] [1903] 1 Ch. 457.
[19] [1901] 2 Ch. 534.
[20] [1903] 1 Ch. 457, 462.
[21] Ibid. 956.

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"that the applicant cannot succeed unless she can bring herself "within *In re New*.[22] Putting that case shortly, it is this—that "a case may arise in which, in the course of the administration "of an estate, such an emergency may occur that it must be "dealt with at once; but it cannot be said that there is any such "emergency here. The appeal must, therefore, be dismissed, "and with costs." Romer L.J.: "I agree. *In re New* [22] shows "how far the court will go, and beyond what point it will not "go." Cozens-Hardy L.J. said: "I agree. I will only add that, "in my opinion, *In re New* [22] constitutes the high-water mark of "the exercise by the court of its extraordinary jurisdiction in "relation to trusts."

Those judgments are, in our view, consistent, and only consistent, with the conclusion we have expressed above, and are irreconcilable with the broad general proposition for which counsel for the appellants have contended. It is to be noted that Romer L.J., who had delivered the judgment in *In re New*,[22] was a member of the court in *In re Tollemache*.[23] In view of the arguments now put forward, the present members of the Court of Appeal wish that he had more precisely stated the limits of the jurisdiction which he plainly had in mind, he indicated no dissent from, or qualification of, the other judgments of the court or the judgment of Kekewich J. We may add that if the scope of the "inherent jurisdiction" was as wide as the appellants would have it, the statutory provisions of the Trustee Act, 1925, and the Settled Land Act, 1925 (to which we come later) must have been otiose or (at best) declaratory.

But to the principle that the court's inherent jurisdiction does not extend to sanctioning, generally, modification or remoulding of the beneficial trusts there are, in our judgment, two exceptions. They are: (1) where a testator or settlor has so provided, particularly by way of a trust for accumulation, that the immediate beneficiaries have no fund for their present maintenance, the court—which has shown dislike for trusts for accumulation—will assume that the intention to provide, sensibly, for the family is so paramount that it will order maintenance in disregard of the trusts for accumulation. This must (we think) be taken as well established: see *Havelock* v. *Havelock* [24] and earlier cases—the principle being stated by Pearson J. in *In re Collins* [25]: "The ground of the decision"—that is, the decision in *Havelock* [26]—"I take to be, that where a testator has made a "provision for a family, using that word in the ordinary sense "in which we take the word, that is the children of a "particular stirps in succession or otherwise, but has postponed "the enjoyment, either for a particular purpose or generally for "the increase of the estate, it is assumed that he did not intend "that these children should be left unprovided for or in a state "of such moderate means that they should not be educated "properly for the position and fortune which he designs them "to have, and the court has accordingly found from the earliest "time that where an heir-at-law is unprovided for, maintenance "ought to be provided for him."

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[22] [1901] 2 Ch. 534.

[23] [1903] 1 Ch. 955.

[24] 17 Ch.D. 807.

[25] 32 Ch.D. 229, 232.

The jurisdiction did not depend on the infancy of the life tenant (see *Revel* v. *Watkinson*,[27]) and was thought by Farwell J. (*In re Walker* [28]) to be rested upon construction, but by Lord Loughborough L.C. (*Greenwell* v. *Greenwell* [29]) to be inherent. Whatever may be the true view, it is impossible, in our opinion, to spell out of the orders made in these cases a general power vested in the court to disregard directions in a trust instrument merely because the beneficiaries wish it so to be. "I decline," said Farwell J. in *In re Walker*,[30] "to accept any suggestion "that the court has an inherent jurisdiction to alter a man's will "because it thinks it beneficial. It seems to me that is quite "impossible."

This exception has therefore no bearing on the present cases and need not be further elaborated.

(2) It must also now be taken in our judgment (at any rate since the decision of *In re Trenchard* [31] 50 years ago) that the court has a further power and jurisdiction (again without prejudice to the general observation first above stated) to approve, on behalf of persons interested under the trust who are under a disability (particularly infants) and persons who may hereafter become interested, compromises proposed by or between persons beneficially interested under the trust who are sui juris, and to direct and protect trustees accordingly; and the word "compromise" should not be narrowly construed so as to be confined to "compromises" of disputed rights.

In *In re Trenchard* [31] the tenant for life had been given the right or privilege of residing free of rent, etc., in certain premises, a right or privilege which was stated to be worth to her £350 per

[26] 17 Ch.D. 807.
[27] 1 Ves.Sen. 93.
[28] [1901] 1 Ch. 879.
[29] 5 Ves. 194.
[30] [1901] 1 Ch. 879, 885.
[31] [1902] 1 Ch. 378.

annum. Although, therefore, if she merely ceased so to reside, she would (according to the language of the will) lose all benefits in respect of the premises, it had been decided that she would none the less be entitled as tenant for life by virtue of her statutory powers under the Act of 1882 to sell the premises and thereafter enjoy the income of the proceeds of sale. It was contended on her behalf before Buckley J. that the requirement as to residence was void—so that she could enjoy any rents or other income from the property remaining unsold but not used by her as her residence. That argument was in terms rejected by Buckley J.[32] The judge's conclusion cannot therefore be founded on the compromise of a doubtful question of the validity of the condition as to residence. On the other hand, the tenant for life and the other persons interested under the trusts (including the class of infants and unborn persons ultimately entitled) had what may fairly be called conflicting "nuisance values." It was shown to be plainly to the advantage of everyone interested, other than the tenant for life, that the house and property on which it stood should be developed. Such a scheme required the retention of the property unsold and the departure therefrom of the tenant for life; and she was not prepared to depart—and thereby lose the equivalent of £350 per annum—unless some compensating payment were made to her. She was willing to take the less sum of £275 per annum and that arrangement, mutually satisfactory and beneficial, was approved by the court. The basis of the jurisdiction exercised, that was, as a compromise in the broad sense in which we have used it, plainly appeared, in our judgment, from the last lines of the judgment[33]: "In fact, "the beneficiaries are receiving something; they are not paying "anything. They pay something less than before, and to that "extent get a benefit. The widow gives up something; but she "obtains this benefit—that she is no longer obliged to reside in "a certain house. The trustees get this benefit—that they are "relieved from the difficulty in which they have been placed "from the circumstance that the widow might have continued "to reside, and thus have interfered with the building scheme; "or she might have sold the house under her statutory powers, "and yet retained her interest in the proceeds of sale. It seems "to me that this is a fair compromise for all parties, and I "declare that it is within the power of the trustees to enter into "it, and I sanction it accordingly."

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[32] [1902] 1 Ch. 378, 381.

[33] Ibid. 385.

In re Wells[34] in the following year, before Farwell J., creates at first sight a greater difficulty. It was particularly relied on by Mr. Neville Gray and Mr. Bowyer to support their contention for a broad and general jurisdiction to depart from the terms of a trust instrument. We cannot so regard it. If Farwell J. thought that he was exercising such a jurisdiction, he would have been departing entirely from the principle he had stated two years earlier in *In re Walker*[35] in the passage from his judgment already cited. The facts of the case were most unusual. The relevant will provided that life annuities should be paid to the testator's two daughters and to certain other persons of whom one survived at the date of the proceedings. Subject to those annuities, the estate was divisible equally among the children of the two daughters who survived the last annuitant and attained majority or (in the case of daughters) married. At the date of the proceedings there were living seven children of the two daughters and all had attained the age of 21. The two daughters were the testator's heiresses and next-of-kin. They were aged 58 and 57 respectively and were deemed past child-bearing. On this footing, the annuitants and the daughters and their children between them were capable of putting an end to the trusts of the will, as they desired to do. Settlements had, however, been made by the children of the two daughters and under two of those sub-settlements (but not the rest) children or possible children of the daughters' children were interested. There was, however, in existence at the time of the proceedings only one such grandchild of the daughters—a son of a son of one of them. That child was represented by counsel, and the trustees of each of the sub-settlements were also (according to the report of the case in the Law Times[36] and the Law Journal[37] but not according to the Law Reports[38]) similarly represented.

The proposal was that, subject to certain payments being made to the daughters and the other annuitants (or their assignees) in satisfaction of their respective life interests, the corpus of the estate should be immediately divided among the seven children of the daughters or their assignees. Thus, each child, or the trustees of his or her sub-settlement, would receive at once a substantial sum instead of the chance of getting, when the last annuitant died, the same or a larger sum—if, but only if,

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[34] [1903] 1 Ch. 848.

[35] [1901] 1 Ch. 879.

[36] 88 L.T. 355.

[37] 72 L.J.Ch. 513.

[38] [1903] 1 Ch. 848.

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the child in question survived that date. On that ground (supported by other circumstances not material for present purposes) Farwell J. had no difficulty in holding that what was proposed was for the benefit of the grandchild represented before him and other unborn interests. He relied on the old cases, *Pierson* v. *Shore* [39] and *Inwood* v. *Twyne*,[40] as authority enabling him to approve, on behalf of the grandchild and unborn issue, the substitution for the contingent subject-matter of the sub-settlement made by the grandchild's father of the more certain amount to be paid over under the proposed scheme. As regards the other sub-settlement where possible grandchildren were interested, namely, a sub-settlement made by an unmarried child, Edith Newman, he regarded the circumstance that that child had insured her life for a sum sufficient on her death to recoup to the trustees one-seventh of the sum paid out to the annuitants or their assignees as removing any special difficulty as to her share. The judge seemed, according to the report in the Law Reports,[41] to have regarded himself as concerned only, if "any "difficulty" as regards Edith Newman's share was removed, to protect the interest of the one living grandchild. Thus at the beginning of his judgment he said: "The only question which "causes me any difficulty is the question of jurisdiction. The "arrangement, so far as Andrew's share is concerned, appears "to me to be obviously for the infant's benefit, for he gets the "certainty of £2,000 and upwards instead of the contingent rever"sionary chance of a sum which in all probability would amount "to nothing at all. As regards Edith there is more difficulty, "because the interests of the annuitants and the testator's "co-heiresses and the statutory next-of-kin, who would take in "the event of none of the seven children surviving, are being "bought up out of corpus; but inasmuch as Edith is willing to "insure her life for an amount sufficient to replace the sum so "paid so far as attributable to her share, and to have the "premiums payable made a first charge on the income of the "money which is coming to her, that difficulty, I think, is "obviated. Have I, then, jurisdiction?"

Later in the judgment [42] Farwell J. had expressly disclaimed jurisdiction on the basis that what was proposed was a compromise. "It is true that the case before the court," he said, "is "not a compromise, and that, no doubt, makes some difficulty."

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[39] 1 Atk. 480.

[40] Amb. 417.

[41] [1903] 1 Ch. 848, 851.

[42] Ibid. 854.

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True, there was no element of compromise in the narrow sense of a settlement of some disputed claim or question. But in the broader sense of the word, in the sense in which it may be applied to *In re Trenchard*,[43] we venture to think that there was. But, in any case, there was no rearrangement or altering of any trusts. All persons interested under the trusts of the testator's will, according to its terms, were sui juris and capable of determining the trusts. The difficulty arose solely from the fact that derivative settlements had been made by the persons contingently entitled to the corpus of the estate. No alteration was required of any of the trusts of those settlements. What was proposed was that the trustees of the settlements should receive a present and certain subject-matter instead of their previously existing contingent rights.

In re Wells,[44] then, cannot, in our opinion, support the propositions for which the appellants' counsel relied on it. In any case, too, *In re Tollemache*[45] in the Court of Appeal, where the limits of *In re New*[46] were emphasized, followed *In re Wells*,[47] though the latter case does not appear to have been then mentioned.

It is to be noted that *In re New*[48] was cited in *In re Trenchard*.[49] Whether in strictness the principle underlying the latter case is consistent with the reasoning in *In re New*,[50] it seems to us too late now usefully to debate. The correctness of *In re Trenchard*[51] has never, so far as we are aware, been questioned. We are indeed satisfied—and we were referred to one or two modern instances of orders made in chambers—that the same principle has since been frequently applied. We think that it would be most undesirable to throw doubt on the validity of those decisions through want of jurisdiction, unless at least there was shown to be no authority to support them.

Although, therefore, we do not disagree with the view of Roxburgh J. as regards the effect of *In re New*,[52] we do not think that the jurisdiction of the court to sanction schemes of the character presented in these three appeals is limited to the kind of transaction illustrated by the facts of *In re New*.[52]

We now turn to section 57 of the Trustee Act, 1925. It was presumably the intention of Parliament, in enacting that section, to confer new powers on the court rather than to codify or define existing powers, though it may well be that the new extended jurisdiction does in some degree overlap the old. We have already examined the inherent jurisdiction of the court, and we have found that the common characteristic of the orders which were made by virtue of that jurisdiction was the determination of the court never to depart from the strict letter of the trust further than the exigencies of any particular case demanded. The question now to be considered is whether, and to what extent, section 57 has empowered the court to depart from that principle.

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[43] [1902] 1 Ch. 378.
[44] [1903] 1 Ch. 848.
[45] [1903] 1 Ch. 955.
[46] [1901] 2 Ch. 534.
[47] [1903] 1 Ch. 848.
[48] [1901] 2 Ch. 534.
[49] [1902] 1 Ch. 378.
[50] [1901] 2 Ch. 534.
[51] [1902] 1 Ch. 378.
[52] [1901] 2 Ch. 534.

It was argued before us that, whatever may have been the position before the passing of the Trustee Act, 1925, the court now has jurisdiction, by virtue of section 57, to sanction the alteration or rearrangement of the dispositions declared by a trust instrument, if it is satisfied that it is to the substantial advantage of infants and unborn issue who are beneficially interested thereunder so to do. If this proposition be well founded, it is at least clear that a jurisdiction has been created of a quality which has never been assumed or recognized by our courts before: namely, a jurisdiction to eliminate, vary or remould dispositions and trusts which the settlor himself has thought proper to establish, provided only that the beneficiaries who are sui juris desire it and the court is satisfied that the order, which it is being asked to make, is materially advantageous to the infants and unborn issue concerned. Whether it is said that the court would possess this jurisdiction notwithstanding that the settlor was himself alive and objected to the order proposed, or that one or more of the adult beneficiaries similarly objected, we are not sure. The suggestion is, we think, that the jurisdiction would exist, but that the court would or might, in such circumstances, decline to exercise it; and the same suggestion was made as to cases where the advantage to infants or unborn issue, which might reasonably be expected from a scheme, would be no more than moderate or even small.

The question whether this far-reaching jurisdiction has in fact been conferred by section 57 can only be answered by a consideration of the language of the section itself. [His Lordship read the section and continued:]

It seems to us that the section envisages, on analysis: (i) an act unauthorized by a trust instrument, (ii) to be effected by the trustees thereof, (iii) in the management or administration of the trust property, (iv) which the court will empower them to perform, (v) if in its opinion the act is expedient. It is, we think, mainly on the proper interpretation of the phrase "management or "administration," in the context in which it appears, that the question at issue primarily depends.

Roxburgh J., in his judgment in the third case,[53] after observing that section 64 of the Settled Land Act, 1925, and section 57 of the Trustee Act, 1925, ought, in his view, to be considered together, said: "Looking at section 57 (1), I "notice that it does not begin with a reference to a 'settlement' "or the 'trusts of a settlement,' but to a transaction 'in the "'management or administration of any property vested in "'trustees.' This suggests a practical step of an administrative "character. Further, this step must be capable of being effected "by the trustees. The section does not authorize the court to "do anything beyond conferring such a power on the trustees "(either generally or in any particular instance, and either con- "ditionally or unconditionally) and directing how any expenditure "so authorized is to be borne as between capital and income." After making some observations with regard to section 64 of the Settled Land Act, 1925, the judge referred to the argument which had been addressed to him to the effect that the legislature could not have intended by section 57 to leave the rule in *In re New*[54] unchanged, and said: "It certainly has not done that. "The jurisdiction is no longer 'extraordinary.' It extends to "transactions which are neither urgent nor of an emergency "character, but does it extend to a re-writing of the trusts of "the settlement, to a rearrangement of the beneficial interests "thereunder for the advantage of the beneficiaries generally "where there is no administrative problem? As I look at these "two subsections together it seems to me that they have been "carefully framed so as to imply a negative answer. If it be "asked why, in that case, the Act does not in its express terms "supply the negative answer, I would reply that it could not do "so without defining the boundary between administrative action "and rewriting the trusts, and that is a boundary which is "incapable of precise definition. But it seems to me that "neither section authorizes a transaction which is not of an "administrative character, and that the court cannot confer on "tenants for life or trustees the power to execute a resettlement "or deal with the trust estate on the footing that a resettle- "ment has been executed. No language could be less apt than

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[53] [1952] W.N. 429; [1952] 2 T.L.R. 489; [1952] 2 All E.R. 647.

[54] [1901] 2 Ch. 534.

"this for conferring such a novel and extensive power on the "court. If I am wrong in this view, then I would hold in the "alternative that the legislature has by its language given clear "indication that the court ought not to exercise its discretion in "favour of a transaction or series of transactions which, in its "opinion, are not of an administrative character, but involve a "substantial rewriting of the trusts in order to re-arrange "beneficial interests to greater advantage."

It was argued before us that the judge attributed too limited an effect to the words "management or administration" in section 57, and that in indicating that the phrase, in its context, suggested a practical step of an administrative character, he failed to give sufficient weight to the fact that the words "management" and "administration" are divided by the disjunctive "or," which showed, it was said, that the words were intended to bear separate and individual meanings. Counsel for the appellants submitted that, although certain acts of trustees might equally well be described as either managerial or administrative, a broad distinction ought properly to be drawn between the management of trust property on the one hand and its administration by the trustees on the other. Under the head of management would come, it was argued, the general care and control by trustees over the property of which, so far as legal title went, they were the absolute owners; and an act of management would be one referable to that ownership—for example, the sale or purchase of trust investments. Administration, on the other hand, it was contended, covered all the activities of a trustee which were derived from the fiduciary character of the position which he held; for example, the payment of income to beneficiaries or the execution of a discretionary trust.

Reference was made in this connexion to the managerial and administrative powers which were conferred on the court by the Lunacy Act, 1890, and especially to section 116 (4) of the Act, under which such powers could be exercised both for the maintenance of a patient and the management of his property, and it was suggested that those provisions for management and administration threw some light on the powers which appeared in section 57 under a similar description, and might have been the source of their inspiration. Although we do not think that the Lunacy Act, 1890, affords any very useful analogy (for in matters of lunacy the court is dealing in general with property of which the patient is the legal and absolute owner) it is very possible that the words "management" and "administration" in section 57 are each capable of some shade of meaning which could not properly be attributed to the other; and, indeed, if they were intended by the legislature to be precisely synonymous, it is difficult to see why they were both introduced into the section. To enable the appellants, however, to succeed in the two appeals in which the section is relied on, it is necessary for them to show that one of the two words is fairly applicable to beneficial interests; and as "administration" is, at first sight, more readily adapted to this purpose than "management," they naturally founded their argument on the former word in preference to the latter.

In our opinion the word "administration" is not capable, in the context in which it appears, of bearing the meaning which the appellants seek to attach to it. It is clear, in our judgment, that the subject-matter both of "management" and of "administration" in section 57 is trust property which is vested in trustees; and in our opinion "trust property" cannot, by any legitimate stretch of the language, include the equitable interests which a settlor has created in that property. We think that the reason for the appearance of the word "administration" as an alternative to "management" in the section is that, although the words do largely overlap, it was thought possible that an unduly narrow interpretation might be adopted, if only one word were to be used without the other. Be that as it may, we are satisfied that the application of both words is confined to the managerial supervision and control of trust property on behalf of beneficiaries. Such is the natural scope of both expressions, and to attribute to them, or either of them, an additional association with the beneficial interests themselves, would be to superimpose upon their ordinary significance an interpretation that is both unnatural and unwarranted.

Nor are further objections wanting, as the following observations (some of which, at least, are applicable also to section 64 of the Settled Land Act, 1925) will show. We have already pointed out that neither trustees nor the court itself at any time, before 1925, had any general power to depart from the precise directions (provided that they were within the law) that a settlor thought proper to declare. If Parliament, in enacting section 57, had intended to confer this power on the court it is, in our view, inconceivable that it would not have done so in express terms, having regard not only to the novelty but also to the width of the jurisdiction that it was creating; and it is equally incredible that it should have done so without imposing any kind of limit, other than expediency, upon the extent to which, or the manner in which, the court was to exercise its powers. Not only did the legislature do neither of those things, but it did not even mention beneficial interests from the beginning of the section to the end, or give the slightest indication that it was intending to give power to vary or interfere with such interests or intermeddle with them in any way—except to the extent that they might incidentally be affected by the exercise of the powers which the section does in terms confer. Further, the examples, which are given in the section of the kind of "transaction" which the legislature had in mind, are all instances of management of property in the ordinary sense, for example, sales, leases, exchanges, etc. Again, the authorized transactions are those proper to be undertaken by the persons in whom the control of the property is vested, namely, the trustees, and not the beneficiaries. And finally, the word "trustees" in the section includes legal personal representatives as well, and one can scarcely suppose that Parliament was intending, by a side wind, as it were, to enable an executor, even with the authority of the court, to depart from the dispositions of his testator's will.

In our judgment, the object of section 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries and, with that object in view, to authorize specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual "emergency" had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen; but it was no part of the legislative aim to disturb the rule that the court will not rewrite a trust, or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction.

Of the very many orders which have been made under the section by the judges of the Chancery Division since the Trustee Act, 1925, passed into law, only a few have been reported, for the applications which come before them are almost invariably, and rightly, heard and disposed of in chambers. A few, however, were brought to our attention which were wholly or partially dealt with in open court, and it will be convenient to consider some of them shortly; in only two of them were orders made which support a wider interpretation of section 57 than that which we ourselves have attributed to it.

In re Salting[55] was reported on a point which is not material for present purposes, namely, whether an order, which had been made in the same proceedings in chambers, had brought about a forfeiture of the tenant for life's interest in the trust fund. It is that earlier order which is relevant. Under the will of the testatrix a sum of £150,000 was held in trust to pay the income thereof to the plaintiff until he should assign, charge or otherwise execute, do or suffer some deed, act or thing (except as therein mentioned) whereby the income or some part thereof would, if belonging absolutely to him, become payable to some other person or corporation, and, upon failure of such trust in his lifetime, then upon discretionary trusts for the benefit of the plaintiff, his wife and children or, if there should be no wife or children of the plaintiff in existence, for the benefit of the plaintiff and his brothers, sisters, nephews and nieces for the time being in existence in such manner as the trustees should in their discretion think fit. The plaintiff, who was married, but had no children, was in debt and he applied to the court under the Trustee Act, s. 57, for authority to the trustees of the will to raise £15,000 out of the capital of the trust legacy and to apply the same in discharge of his debts and otherwise for his benefit upon his effecting a policy of assurance for £15,000 upon his own life and assigning it to the trustees to secure repayment of the advance. An order was made sanctioning (subject to certain qualifications) the above proposal. The result of the order was to secure the repayment of the £15,000 to the trust capital on the death of the life tenant, and the interests of the remaindermen were accordingly safeguarded. It will, however, be observed, that, if at any time subsequent to the order the plaintiff should forfeit his life interest, the income from the £15,000 which had been withdrawn for payment of his debts would not be available for the objects of the discretionary trust. We have referred to the original order (which Eve J. made on March 7, 1932), and it would appear that there were four objects of the trust before the court, of whom two (namely, the plaintiff's wife and Mrs. O'Brien, who was probably a sister of the plaintiff) consented to the order, whilst the other two were infants and therefore could not consent; the order also shows that no provision of a compensatory character was made for the benefit of the objects of the discretionary trust as a whole who would be disappointed, in the way that we have indicated, in the event of the plaintiff forfeiting his interest. It was held by Eve J. in the case as reported that the order made in chambers did not itself work a forfeiture. It may well be that the loss of income on the £15,000 between the date of any forfeiture that the plaintiff might subsequently incur and the date of his death was not present to the minds of anyone when the proposed scheme for payment of his debts was discussed and sanctioned in chambers. Had it been considered, we think that, at the least, some provision for compensating the objects of the discretionary trust would have been insisted upon; for, in our opinion, the court had no power, whether under section 57 or otherwise, to override the interests of the plaintiff's nephews and nieces, however "expedient" the transaction might be from the point of view of the plaintiff himself and his immediate family.

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[55] [1932] 2 Ch. 57.

In *In re Mair*[56] it could again be said that an order was made which might defeat, without compensation, the claims of the objects of a discretionary trust which had not, but might thereafter, come into operation. At the date when the order was made, the income of the fund, which was there in question, was held on determinable trusts for the benefit of two women who were aged respectively 69 and 70; in the event of either of the women forfeiting her interest, her share of income would be held upon a discretionary trust for the two women and their husbands and, subject thereto, the women together were absolutely entitled to the fund. The court was asked to sanction, under section 57, a proposal for the payment to each of the women of a portion of the capital of the trust fund. Both the women were married and their husbands supported the proposal. Accordingly, the only beneficial interests which were not before the court (except in so far as they were represented by the trustees) and which could possibly be affected by the order were the future husbands of these two elderly women, who (if they should ever come into existence) would be objects of the discretionary trusts if a forfeiture were incurred. It is true that the interests of these hypothetical persons were disregarded by the court, when it sanctioned the proposal, but it was so unlikely that their claim would ever arise, that the omission to provide for it is not, perhaps, very surprising.

In the course of his judgment in *In re Mair*[57] Farwell J. said: "If and when the court sanctions an arrangement or transaction "under section 57, it must be taken to have done it as though the

[56] [1935] Ch. 562.

[57] Ibid. 565.

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"power which is being put into operation had been inserted in "the trust instrument as an overriding power." This view has been repeatedly followed and adopted in later cases, and it is not without importance in connexion with the opinion which we have already expressed as to the limited scope of the section; for it would be difficult to regard as inserted in a trust instrument a general power to override the trusts which were declared by the very instrument itself.

In *Municipal and General Securities Co. Ld.* v. *Lloyds Bank Ld.*[58] Wynn-Parry J. was asked (inter alia) to sanction, under section 57, the sale by trustees of certain stock. The judge declined to do that and, in the course of his judgment on the point, he expressed himself as follows: "The first point which "I have to decide is whether there is jurisdiction in the court "under section 57 of the Trustee Act, 1925, to make an order, "giving authority to sell or authority to re-invest. The section "is couched in wide language and there is little guidance in the "reported cases, a circumstance which, of course, is explained "by the fact that most applications under this Act are heard in "chambers. It appears to me that there must be some limit to "the scope of this section. It cannot be construed as having "such wide import as would allow a complete re-writing of a "trust deed or a substitution of a completely different object "from that for which the trust was brought into being.

"I find support in that view that there must be some limit to "the scope of the section in the opening words, which are: "'Where in the management or administration of any property "'vested in trustees . . .'. If those words, 'management or "'administration' are to have no significance, it would have been "the easiest thing in the world for the section to have opened "with the words: 'Where any property is vested in trustees "' . . .'. I do not intend for one moment, and I must not be "taken as intending, to attempt to state what in my view is the "exact scope of the section. I cannot see that I should be doing "any service by embarking on any such attempt. It is very "much better that each case as it comes up should be considered "separately; but for the present purpose I do feel that I have "to consider whether this application is one which I have jurisdiction to entertain upon the view which I take, that the "words 'management or administration' at the beginning of the "section have a limiting effect upon the jurisdiction conferred "upon the court."

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[58] [1950] Ch. 212, 223; [1949] 2 All E.R. 937; 65 T.L.R. 744.

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It follows from what we have already said that we are in agreement with those observations of Wynn-Parry J.; and that in our judgment, unless any proposed transaction is one which is specifically related to the management or administration by trustees of trust property, quoad property, it does not fall within the scope of section 57.

There remains section 64 of the Settled Land Act, 1925, which is relevant to and invoked in the first of the appeals before us. [His Lordship read section 64 and continued:]

Roxburgh J. said[59]: "Looking at section 64 (1), I observe "that it does not begin with a reference to a 'settlement' or the "'trusts of a settlement,' but to a 'transaction.' This suggests "a practical step of some sort. A reference to the definition in "section 64 (2) suggests that the practical steps under con-"sideration are of an administrative character, and a reference "back to section 64 (1) shows that they must be such as are "capable of being effected by the tenant for life. The section "does not empower the court to do anything beyond authorizing "the tenant for life to effect the transaction."

With all respect to the judge, we are unable to agree that the word "transaction" in this section should be given a restricted meaning such as he suggests. The word is one of the widest import—as is emphasized, in our judgment, by the terms of the second subsection, which make the meaning of the word comprehend (inter alia) any application of capital money "and any "compromise or other dealing, or arrangement." A further objection to the suggested view that the only transactions envisaged by section 64 are "practical steps . . . of an administrative "character" seems to us to be afforded by the fact that acts of that description are at least to a considerable extent provided for by section 71 of the Act. It is, of course, by no means impossible to think of managerial or administrative acts involving capital expenditure in addition to those enumerated in section 71, and, in the course of argument, Mr. Buckley suggested, as an example, expenditure for opposing a proposed hydro-electric scheme on other land, which might affect the settled land or its amenities. It is, however, very improbable, in our opinion, that the object of section 64 was to act merely as a supplement, as it were, to section 71. If such had been the intention it would have been easier and more natural to amend section 71 itself.

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[59] *In re D.'s Settled Estates* [1952] 2 T.L.R. 483; [1952] 2 All E.R. 603, 606.

It is true (as was pointed out in argument) that the transaction is one that must be effected, as the judge observed, by the tenant for life. But having regard to the general scheme of the Act, whereunder the settled land is vested in the tenant for life with wide powers of ownership, and to section 75 (2), which contemplates the giving of discretions to the trustees as to capital moneys by the tenant for life, this qualification does not appear to us (at least for present purposes) to present difficulty. It is also necessary that the court should be satisfied that the transaction proposed should be for the benefit of either the settled land or some part thereof or of the persons interestd under the settlement; but not necessarily of both. Of more significance is the qualification that the transaction should affect or concern (and the disjunctive "or" is to be noted) the settled land "or any "other land" (which we construe as meaning any land whether settled or not and whether within or without England). In our judgment, the test imported by this last qualification is satisfied by transactions indirectly, as well as directly, operating upon the settled land (or other land), provided that in the former case the effect is real and substantial by ordinary common-sense standards, as distinct from that which is oblique or remote and merely incidental. This view is, in our judgment, supported by the circumstance that the transaction is within the jurisdiction of the court to approve, though it is, in the opinion of the court, for the benefit of the persons interested under the settlement and not of the settled land. There is, we think, nothing inconsistent with the view which we have expressed in the judgment of Cohen J. in *In re Scarisbrick Resettlement Estates* [60] and of Harman J. in *In re Mount Edgcumbe*.[61] On the other hand, our conclusion upon the scope of the section is in accordance with the decision of this court in *In re White-Popham Settled Estates*.[62]

The judge, as we understand him, thought that the two sections, section 57 of the Trustee Act, 1925, and section 64 of the Settled Land Act, 1925, were closely analogous, conferring parallel jurisdictions, the one in regard to settlements not comprising land, the other in regard to settled land. It follows from what we have said that we have not altogether shared this view. The jurisdiction under section 64 of the Settled Land Act, 1925, is, in our judgment, in some respects more ample in regard to the

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[60] [1944] Ch. 229; [1944] 1 All E.R. 404; 60 T.L.R. 263.

[61] [1950] Ch. 615; [1950] 2 All E.R. 242; 66 (Pt. 1) T.L.R. 1174.

[62] [1936] 1 Ch. 725; [1936] 2 All E.R. 1486.

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subject-matter to which it relates than is section 57 of the Trustee Act, 1925. If this result is regarded as unexpected, we point out that the language of the two sections is to a material degree dissimilar, and the conclusions which we have formed are based on what we regard, in each case, as the natural meaning of the words used. It is perhaps worth observing that, in the case of a settlement the trustees of which are trustees for the purposes of the Settled Land Act, 1925, but which no longer comprehends any unsold land, neither section has any application.

We now proceed to apply the principles which we have stated to the three cases before us.

In re Downshire Settled Estates:

The relevant facts in this case are that by a deed of resettlement made on September 23, 1915, between the Sixth Marquess of the first part, the plaintiff in the present proceedings, now the Seventh Marquess, of the second part, and the trustees of the settled estate of the third part, the settled properties, consisting of lands in England, Northern Ireland and Eire, and invested capital moneys (particulars of which are hereafter stated), were resettled (subject to a prior power of joint appointment, which was never exercised on the part of the Sixth Marquess and the plaintiff) to the following uses so far as material, to take effect after the death, which occurred on May 29, 1918, of the Sixth Marquess; first, to the use of the trustees during the life of the plaintiff upon trust that if at the time of the recited trust taking effect in possession " no act or event other " than the exercise of any power conferred on the plaintiff should " have been done or happened whereby the life estate thereby " given to him under the trust premises or some part thereof " would, if belonging absolutely to him, have become vested in " or charged in favour of some other person or persons or a " corporation," the trustees should allow the plaintiff to enter into and remain in possession or receipt of the rents and profits of the said premises during his life " or until some act or event " as aforesaid should be done or happen ": second, during such part or parts of the life of the plaintiff as he should not be entitled to the possession or receipt of the rents and profits of the settled property by virtue of the preceding trust, the trustees should pay all or any part of the net rents and profits or apply the same for the maintenance or personal support or benefit of all or any one or more to the exclusion of the others or other of the following persons: namely, the plaintiff and his wife, if any, and his children or remoter issue for the time being in existence in such manner as the trustees should in their absolute discretion think proper; and should accumulate any surplus of such rents or profits and hold the accumulations as capital moneys.

From and after the death of the plaintiff, the uses of the resettlement were (a) to the use of the first and other sons of the plaintiff successively according to seniority in tail male, with remainder (b) to the use of the second defendant (the plaintiff's brother) during his life, with remainder (c) to the use of the first and other sons of the second defendant successively according to seniority in tail male, with remainders over.

The resettlement contained powers for the plaintiff and for every person thereby made tenant for life of the settled property at any time or times and either before or after becoming entitled to the possession of the settled property by deed or will to appoint to any wife, in the event of her surviving him, during the residue of her life or any less period a jointure rentcharge of £4,000 per annum, without any deduction except for death duties; and also to charge the settled property with sums for the portions of younger children of the appointor, the maximum amount capable of being so appointed by any appointor being £50,000.

At the present time, the second defendant has two daughters but one son only, namely, the third defendant, who has attained the age of 21 years. Further, by a disentailing deed dated May 30, 1952, the third defendant has disentailed the entirety of the settled property. The plaintiff, who is now 58 years of age, has never been married. The present effect, therefore, of the resettlement is that, subject to the uses and trusts declared to take effect during the plaintiff's life and to the possibility of the plaintiff having issue, the settled property will devolve upon the second defendant for life and thereafter belongs absolutely to the third defendant.

As above stated, the settled property consists both of land and investments of capital moneys. Its total value is upwards of £1,100,000, of which approximately £400,000 is represented by land, the greater part being in Northern Ireland. The land in England includes a house at Bracknell occupied by the plaintiff, and there is also a house in Northern Ireland known as Murlough House, which constitutes the plaintiff's home.

The scheme proposed and submitted to the court for its sanction on behalf of the trustees is to this effect: that the plaintiff will surrender all his interest for his life in £700,000,

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being the bulk of the capital moneys subject to the settlement, so as to accelerate the interests in remainder to come into effect after his death, and will also release such capital moneys from his powers of charging for jointure or portions. At the same time the second defendant similarly releases his own life interest in these capital moneys in favour of the remainderman, and similarly releases his own powers of charging the £700,000 for jointure and portions. If it were not for the trusts affecting the plaintiff's life estate (commonly known as "protective trusts") there would so far be no difficulty: the result would be that the capital of the £700,000 would be absolutely vested in the third defendant, subject to its being divested in favour of a son hereafter born of the plaintiff. In order, therefore, to surmount the difficulty created by the "protective trusts" during the plaintiff's life, the scheme provides (1) that the plaintiff's surrender of his interest in the £700,000 capital moneys shall not be treated as involving a forfeiture of his life estate in the English and Irish lands; (2) the trustees are required to release the same capital moneys from the discretionary trusts affecting the income of such funds during any part of the plaintiff's life.

But although the plaintiff is now unmarried, he may hereafter marry and have children. In that event, notwithstanding the disentailing assurance, the absolute interest of the third defendant would be divested in favour of the plaintiff's sons: further, there would then come into existence objects of the discretionary trusts other than the plaintiff, namely the plaintiff's wife and issue. To provide for these contingencies, (a) it is part of the scheme that a single premium policy should be taken out assuring payment to the trustees in the event of a son being hereafter born to the plaintiff of the sum of £49,000, this amount being calculated to make good the sum that would remain on the death of the plaintiff, after payment of estate duty at the appropriate rate now ruling of 80 per cent., of £200,000 (part of the sum of £700,000), which it is proposed to distribute as hereafter appears; (b) it is also provided that a sum of £20,000 war stock should be retained by the trustees to the intent that if and so long as there should at any time during the plaintiff's life be in existence a wife or any child or remoter issue of the plaintiff, the trustees should pay and apply the income of this stock, or the investments representing the same, for the maintenance or personal support of all or any one or more of the plaintiff's wife, children, or remoter issue, as they should in their discretion think fit: and that, subject thereto, such sum of stock should fall into that part of the corpus of the funds which is not to be distributed as hereafter appears.

To give effect to this scheme, it is proposed that the capital moneys should be divided into three funds: first, a sum of £100,000, which would be paid absolutely to the plaintiff in consideration of his giving up all interest for his life in the capital moneys, which sum, according to the evidence, represents something less than half the present value of the plaintiff's life interest, upon the footing that no forfeiture is incurred, and having due regard to his age and state of health: second, a further sum of £100,000, which will be paid to the second defendant in consideration of his surrender of his life interest in the £700,000 capital moneys; and third, a sum of £500,000 (referred to in the scheme as the third defendant's fund), which will, subject to payment thereout of the costs of the scheme, of the premium on the policy above mentioned, and to retention thereout of the sum of £20,000 war stock also above referred to, be held by the trustees upon the uses and trusts of the settlement to take effect after the death of the plaintiff and the second defendant, that is, upon trust for the third defendant absolutely, subject to being divested in favour of a son of the plaintiff hereafter to be born.

We have already stated that it is part of the scheme that the powers of the plaintiff and the second defendant to charge the settled property with jointures and portions should be restricted to the settled lands, so as to release the £700,000 capital moneys entirely therefrom. Other provisions are contained in the scheme to provide for payment of estate duty on the plaintiff's death in respect of the fund payable to the second defendant and otherwise, but it is not necessary for present purposes to refer to these matters in any further detail. It will be seen that the scheme is so devised that if the plaintiff lives the requisite length of time after the scheme, if approved, becomes effective, the third defendant's fund would not appear, under the law as it at present stands (though we are not, of course, so deciding), to pass or be deemed to pass, upon the plaintiff's death.

The scheme proposed being of the character which we have indicated, Roxburgh J. took the view that, whatever its merits, he had no jurisdiction, either under the inherent jurisdiction of the court or under the Settled Land Act, 1925, to give his approval to it. He said[63]: "I hold that the transactions involved in this scheme amount in substance to a re-writing of "the trusts or a substantial part thereof, or to directions to "administer the trust property on the footing that new trusts "have been declared and old trusts have been struck out or "varied, and the admitted purpose of the scheme is not to solve "any administrative problem but to re-arrange beneficial interests "to greater advantage. Such proposals fall, in my judgment, "outside the scope of the court's 'extraordinary' jurisdiction "(if, indeed, it has not been superseded by sections 64 (1) and "57 (1)). They also fall outside the ambit of section 64 (1)."

We agree with the judge that the case cannot fairly be brought within the scope of that aspect of the court's jurisdiction expounded in *In re New*.[64] We have already stated what we conceive to be the effect of that decision and of the later case of *In re Tollemache*,[65] and what, accordingly, are the nature and, broadly, the limits of that aspect of the court's jurisdiction which was in those cases invoked. It is sufficient to say that the scheme now proposed, in our view, plainly falls outside those limits. But, as we have explained, the jurisdiction exercised in *In re New*[66] is not exhaustive. In our judgment, the present scheme does fall fairly within the ambit of the court's jurisdiction to approve compromises (used in the broad sense of the word) which is illustrated in Buckley J.'s decision in *In re Trenchard*.[67]

Forfeiture clauses are always strictly construed by the court. It was therefore suggested during the argument that the particular terms of the so-called "protective trusts" during the life of the plaintiff were not such as to disable the plaintiff from surrendering his limited interest in the capital moneys so as to accelerate the interest to take effect after his death and exclude the coming into operation of the discretionary trusts during his life, on the ground that the effect of a surrender might fairly be said not to "vest the life estate," as such, in the remaindermen, and that he was capable of making the surrender without incurring any forfeiture of his interest in the unsold land.

This argument, unless rejected by the court, would no doubt give the court power to consider and sanction the scheme as constituting a compromise in the strict sense of the word. But it is, in our judgment, unnecessary to go so far; for we think that, apart from that argument, the proposals may fairly and properly be regarded as constituting a compromise in the broader sense of the word in which it was used in *In re Trenchard*.[67] The plaintiff has a real and present interest in the £700,000 of capital moneys, namely, the right to enjoy the income thereof during his life until the happening of an event which it is (except in very special circumstances) in his power to avoid. The plaintiff offers to give up this right and interest for the benefit of the persons next entitled after his death—but upon terms. The persons presently so entitled (being sui juris) are prepared to accept the offer. The only question, therefore, is whether adequate provision is made for persons now unborn or unascertainable who might be affected. The court is asked to answer the question affirmatively and authorize the trustees to act accordingly—at the same time relieving (if the plaintiff so long lives) those who would have to bear the burden from liability to suffer a very heavy payment of death duties. In our judgment, accordingly, the scheme is one which it was within the court's jurisdiction to sanction. And having also considered the details of the scheme to which we have already referred, we are of opinion that (subject to one or two matters upon which we should wish to have the further assistance of counsel) it is one which, in the exercise of the court's discretion, should now be approved.

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[63] *In re D.'s Settled Estates* [1952] 2 All E.R. 603, 608.

[64] [1901] 2 Ch. 534.

[65] [1903] 1 Ch. 457.

[66] [1901] 2 Ch. 534.

[67] [1902] 1 Ch. 378.

In the circumstances, it is in strictness unnecessary for us to express a view whether the scheme also properly falls within the ambit of section 64 of the Settled Land Act. It is, however, to be noted that the land, that is, all the land both in England and in Ireland, is " affected " or " concerned " in that (a) all jointure and portion charges are under the scheme thrown exclusively upon it, and (b) the plaintiff remains tenant for life in possession of all the land, notwithstanding that upon a true construction of the settlement he might cease so to be. Whether or no these features alone would suffice to satisfy the test inherent in the first two lines of the section, that test would, as we think, be satisfied if in addition it were shown (as we were informed that it could be shown) to be a real object of the scheme that the land should be substantially preserved so as to provide a home or homes for the future holders of the plaintiff's title, by relieving the estate from claims for death duties which would otherwise be likely to cause the properties to be wholly or largely broken up. And we further think that the scheme may fairly be described as, or as involving, a "transaction" to be effected by the tenant for life since, apart from his own surrender of his limited interest, the payments and appropriations of the £700,000 of capital moneys by the trustees will be effected by them (having regard to section 75 (2) of the Act) at the plaintiff's direction. We do not think this conclusion is altered by the circumstance that the second defendant also surrenders his reversionary life interest and his powers in and over the capital sum, since he is in any case free to do so. The court being therefore (as already indicated) of opinion that the transaction is for the benefit (at any rate) of the persons interested under the settlement, we think that the scheme is also one which the court is competent to approve, and ought to approve (subject to the discussion upon certain matters already mentioned), under its statutory jurisdiction conferred by section 64 of the Settled Land Act, 1925.

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[67] [1902] 1 Ch. 378.

In re Chapman's Settled Estates:

Three settlements are concerned in this application. By the first of such settlements, dated March 15, 1944 (hereinafter sometimes referred to as "the 1944 settlement"), after reciting that Col. Robert Chapman and his wife Hélène Paris Chapman (hereinafter referred to respectively as Sir Robert and Lady Chapman) as settlors had (in effect) purchased a certain piece of land therein mentioned to be held on the trusts of the settlement and to be conveyed to the trustees thereof, and that certain further assets might from time to time be brought into the settlement by the settlors, it was declared by clause 1 that the said land or the proceeds of sale thereof and such further assets as aforesaid were thereinafter referred to as "the trust premises." Clauses 2, 3 and 4 of the 1944 settlement are as follows: "2. The "trustees shall stand possessed of the trust premises (subject to "clauses 3 and 4 following) for all or any the child or children "of the settlors' son Robert Macgowan Chapman who shall attain "the age of twenty-one years or die under that age leaving "issue and if more than one in equal shares as tenants in "common. 3. Provided always that until the youngest child of "the said Robert Macgowan Chapman shall have attained the age "of twenty-five years if that event shall happen within twenty-"one years from the date hereof or until the expiration of "twenty-one years from the death of the survivor of the settlors "if the youngest surviving child of the said Robert Macgowan "Chapman shall not then have attained the age of twenty-five "years the trustees shall retain the trust premises and shall "apply such part as they in their discretion shall think fit of "the income thereof for or towards common maintenance "education or other benefits of the children of the said Robert "Macgowan Chapman for the time being living whether minors "or adults or for or towards the maintenance education or other "benefit of any one or more of them to the exclusion of the "other or others and shall (subject as hereinafter mentioned) "accumulate the surplus of such income until the time for distribution by investing the same and the resulting income thereof "in any investments hereby authorized in augmentation of the "capital of the trust premises to be held upon the same trust "as the original trust premises but so that the trustees may "apply the accumulations of any preceding year or years in or "towards the maintenance education or benefit of all or any "of the said children in the same manner as such accumulations "might have been applied had they been income arising from the "original trust funds in the then current year."

Then there is a proviso: "Provided always that after each "child of the said Robert Macgowan Chapman has attained his "or her majority the surplus income of his share in the trust "premises not expended by virtue of the foregoing powers of "this clause shall not be accumulated but shall be paid to such "child.

"4. Provided also that the trustees may at any time with the "consent in writing of the settlors raise any part or parts not "exceeding in the whole one-half of the then expectant or presumptive or vested share of any child whether minor or adult "of the said Robert Macgowan Chapman in the trust premises "under the trust hereinbefore contained and pay or apply the "same to him or her for his or her advancement or otherwise "for his or her exclusive benefit in such manner as the trustees "shall think fit and as to the part or parts so raised the maintenance and other trusts of the last preceding clause shall cease "to be applicable and no interest on any such advance shall be "charged to any child so advanced in the accounts of the trust." The remaining clauses of the settlement were administrative and are not relevant for the purposes of this appeal.

By the second of the said settlements, dated February 8, 1950 (hereinafter sometimes referred to as "the 1950 settlement"), Lady Chapman settled further funds on substantially the same trusts for the benefit of Mr. Robert Chapman's children as those declared by the 1944 settlement. In particular, the

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provisions for common maintenance and accumulation contained in clause 3 of the 1944 settlement were repeated by clause 4 of the 1950 settlement, save that the reference in the former clause to the expiration of 21 years from the death of the survivor of the settlors was altered in the latter clause to the expiration of 21 years from the death of Lady Chapman.

By the third above-mentioned settlement, dated February 10, 1950 (hereinafter sometimes referred to as "the Nicholas settlement"), which was made on the occasion of the marriage of Henry James Nicholas Chapman with Anne Barbara Croft, Lady Chapman settled certain funds upon trusts for the benefit of the children of that marriage and of the husband and the wife or (if none of such children attained a vested interest) then upon similar trusts for the benefit of the children of Nicholas by any subsequent marriage and of Nicholas and any subsequent wife, and it was provided (clause 4) that, in the event of the determination or failure of such trusts, the trustees should pay over the trust funds (subject as therein mentioned) to the trustees of the 1950 settlement, to be held by them upon the trusts of that settlement.

Mr. Robert Chapman (who is the son of Sir Robert and Lady Chapman) has been married once, namely, to his present wife, Barbara May Chapman, and there have been three children of the marriage, namely, the defendants David Robert Macgowan Chapman, who was born on December 16, 1941, Peter Stuart Chapman, who was born on August 24, 1944, and Elizabeth Mary Chapman, who was born on May 11, 1946. There has been no issue as yet of the marriage between Henry James Nicholas Chapman and his wife Anne Barbara.

As at March 24, 1952, the estimated values of the funds comprised in the three settlements were respectively as follows:—The 1944 settlement, £43,300, of which £27,700 was settled by Sir Robert, and £15,600 by Lady Chapman; the 1950 settlement, £14,700; and the Nicholas settlement, £19,600. By reason of the discretionary trusts for the common maintenance of Mr. Robert Chapman's children contained respectively in clause 3 of the 1944 settlement and clause 4 of the 1950 settlement, the trustees of those settlements were advised that, except in certain unlikely events, a claim for estate duty would arise in respect of the funds comprised in the former settlement on the death of the survivor of Sir Robert (now aged 72) and Lady Chapman (now aged 65) and in respect of the funds comprised in the latter settlement upon the death of Lady Chapman. Further, the trustees of the Nicholas settlement were advised that, if the substitutive limitation contained in that settlement, and before referred to, is valid and should become effective, a claim for estate duty will arise in respect of their fund by reason of that limitation. If the present rates of estate duty remain unchanged, it is estimated that nearly £30,000 will be exigible for duty in respect of the three trust funds, whether Sir Robert survives or predeceases Lady Chapman.

In those circumstances a scheme of arrangement was prepared, the object of which was to avoid the expected claims for duty on the deaths of Sir Robert and Lady Chapman. That object could only be achieved by freeing the 1944 and 1950 settlement funds from the provisions for common maintenance contained in clauses 3 and 4 of those settlements respectively. It was accordingly proposed that the trustees of those settlements should, with the sanction of the court, advance their respective funds to the trustees of a new settlement, which was to be entered into containing similar trusts but omitting those provisions; and that the trustees of the Nicholas settlement should, on the failure of the trusts therein contained for the benefit of Nicholas Chapman and his present and any future wife and issue, similarly transfer their fund to the trustees of the proposed new settlement to be held upon the trusts thereof.

On June 16, 1952, the originating summons in these proceedings was issued by the trustees of the 1944 and 1950 settlements. The defendants are Mr. Robert Chapman and Nicholas Chapman (as trustees with the plaintiffs, Sir Robert and Lady Chapman, of the Nicholas settlement) and the three infant children of Mr. Robert Chapman. The summons asks for an order authorizing the trustees of the 1944 and 1950 settlements and of the Nicholas settlement respectively to do respectively all such acts and things and to execute respectively all such documents as may be necessary on their part to give full and proper effect to the provisions of the scheme of arrangement hereinbefore referred to; and, alternatively, for an order authorizing the trustees of the 1944 and 1950 settlements to release all property, which is now or may hereafter become subject to the said settlements respectively, from the trusts declared in the case of the 1944 settlement by clause 3 thereof, and in the case of the 1950 settlement by clause 4 thereof, to the intent that the trust premises shall from and after such release be held in the case of the 1944 settlement upon the trusts declared by clause 2 thereof, and in the case of the settlement of 1950 upon the trusts declared by clause 3 thereof. The summons further asks for an order that from and after the bringing into effect of the said scheme or, as the case may be, the execution of such release as aforesaid, the same shall be binding on all persons interested in the property affected thereby.

The summons came on for hearing before Harman J. in chambers on July 28, 1952. The judge, without going into the merits of the scheme, dismissed the summons on the ground that he had no jurisdiction, either under the inherent jurisdiction of the court or under section 57 of the Trustee Act, 1925, to make the order asked for; and from that dismissal the plaintiffs have appealed to this court.

The case as presented before us on behalf of the appellants was mainly founded upon the inherent jurisdiction of the court but, in the alternative, it was submitted that the scheme was a "transaction" within section 57 of the Trustee Act, 1925, which the court, accordingly, had statutory power to authorize. In our opinion, if the court has no power under its general jurisdiction to make the order for which the appellants ask, then the order cannot be made at all. The reason for this view is that, as we have already pointed out, the alteration or remoulding as such of trusts declared by a settlement is not within the scope of section 57, which only empowers the court to make orders, if it thinks it expedient so to do, with reference to the management or administration by trustees of the trust property which is vested in them. The scheme which is proposed in the present case does not in any sense arise out of any administrative or managerial difficulty affecting the trust assets; its origin and aim are solely referable to the desire of the parties concerned to avoid a charge which will, or may, become leviable for death duties in consequence of the trusts as framed by eliminating from the 1944 and 1950 settlements the particular provisions which it is feared may give rise to the claims for duty. Such a scheme is, accordingly, in our view clearly outside the purview of section 57, having regard to the interpretation and effect which we have attributed to the section.

As to the inherent powers of the court, it was sought, in the first place, to argue that the court has unlimited jurisdiction in relation to the property (including equitable interests) of infants and, indeed, of unborn beneficiaries, and will exercise that jurisdiction whenever it is satisfied that a position has arisen (and it is said that such a position has now arisen) which requires its intervention. That contention has been dealt with in the observations which we have made upon the inherent jurisdiction of the court, from which it appears that the argument, as so formulated, is far wider than reported authority warrants. The position is, as we have said, that the court will not in general assume power to vary the trusts of a settlement even though it might be of advantage to infant or unborn interests so to do. We have pointed out, however, that the general rule is subject to two exceptions, and the only question to be considered in connexion with this appeal is whether the appellants have succeeded in bringing themselves within either of them. The proposal in this case, as already indicated, is in effect to strike out of the 1944 and 1950 settlements the provisions for unequal or selective maintenance during the lives of the settlors and for the accumulation of any surplus income, and to leave the settlements unaffected in other respects. It is clear, we think, that this scheme is not within the exception to the general rule under which the court has sanctioned the maintenance of immediate beneficiaries out of income, notwithstanding that its order pro tanto overrides a direction for accumulation contained in the settlement.

The only possible way, therefore, as it seems to us, that the scheme could be brought within the inherent jurisdiction of the court is by showing that it involves a compromise or composition of beneficial interests to which the principle exemplied in *In re Trenchard*[68] can properly be applied. We are unable, however, to see how any such compromise or composition arises. Certainly there is no question of compromise in the strict sense, for none of the relevant beneficial interests gives rise to any question of construction or is otherwise in dispute. It is suggested, however, that something in the nature of a composition of the rights of Mr. Macgowan's children is to be found in the elimination, during the lifetime of the settlors, of the expectation that each may have of receiving more, or less, than the others, and in substituting equal rights among the class, as between themselves, in its place. We think that there are two objections to the acceptance of this view: first, although it is true that the scheme if sanctioned would have the result described, we cannot regard that result as constituting a composition of rights in any real sense at all. It is nothing more than a rearrangement of beneficial interests which, to the extent that it might prove to be of advantage to some members of the

[68] [1902] 1 Ch. 378.

class, would correspondingly operate to the prejudice of others. It cannot, therefore, be compared to a proposal under which, for example, the contingent interests of all of the members of a class in a fund are converted into vested interests in a smaller fund, for in such a case the proposal, if beneficial to one member of the class, would of necessity be beneficial to them all. Secondly, it is impossible to say, on the facts of the case, that the rights and interests of the children under the existing discretionary trusts are prejudicial to them and should therefore be eliminated. Both of the settlements were executed within the last 10 years, and the trusts in question were presumably inserted therein because the settlors thought that their introduction would be of advantage to the children; they may well have thought, for example, that some of the children might need more for maintenance than others and, accordingly, they empowered the trustees to provide for this if occasion should require. Nothing has since transpired to show that their views on this matter were wrong. All that has transpired is that the manner in which the discretionary trusts were framed may attract an unexpected claim for death duties. The object of the scheme, accordingly, is not to compound the interests which the children have under the discretionary trust, but to avoid the claim for duties; and such avoidance does not, and cannot, be regarded as a composition of rights for the purpose of the second exception to the rule. Moreover, although, as we have previously said, the fact that a scheme will result in the saving of death duties or income tax is, in itself, no ground for its rejection, the acceptance of the scheme now under consideration might well be followed by the presentation of further proposals of a similar character whenever it should be considered desirable in the future to avoid or mitigate the effect of such changes as may occur hereafter in the existing fiscal legislation. We would point out, therefore, that it is no part of the functions of Her Majesty's courts to recast settlements from time to time, merely with a view to tax avoidance even if they had the power to do so which, in our opinion, they have not.

It follows from what we have said that the scheme proposed is in truth what it appears on its face to be, namely, the destruction of trusts expressly declared, and that, inasmuch as it cannot be brought within the first exception to the general rule and cannot, under the guise of a composition, invoke the second exception, the rule applies; and the court accordingly has no

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Chapman's Settlement Trusts, *In re*; Chapman *v.* Chapman.

Blackwell's Settlement Trusts, *In re*; Blackwell *v.* Blackwell.

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jurisdiction to authorize the trustees to carry it into effect. This appeal, in our judgment, must therefore fail.

We would add in conclusion that if, by reason of mistake, a settlement fails to give effect to the real intention of the parties recourse may, in certain circumstances, be made to the special jurisdiction of the court to reform or rectify written instruments. It was conceded that the circumstances of the present case were not such as to justify such a recourse; nevertheless, this application is in substance an attempt to obtain rectification although it purports, in point of form, to invoke the inherent jurisdiction exemplified in *In re New*,[69] as supplemented by section 57 of the Trustee Act, 1925. Attempts of this kind should not, in our view, be encouraged.

In re Blackwell's Settlement Trusts:

This is a case of a voluntary settlement of personalty made by the plaintiff himself on November 17, 1933, shortly after attaining his majority. Under that settlement the trust fund is held upon protective trusts for the plaintiff during his life in the following terms: "Upon trust to pay the income thereof "to the settlor during his life or until he does or attempts to "do or suffers any act or thing or until any event happens "(other than an advance under the statutory power of advancement) whereby if the same income were payable to him "absolutely for his life he would be deprived of the right to "receive the same or any part thereof in any of which cases the "trust hereinbefore declared for payment to him of the said "income shall determine and the trustees during the residue of "his life shall apply the income of the trust estate for the "maintenance and support or otherwise for the benefit of the "settlor and of any wife or issue which he may have as the "trustees in their absolute discretion without being liable to "account for the exercise of their discretion think fit."

Subject thereto, the corpus of the settled property is held upon trust for the children or remoter issue of the plaintiff as he should by deed or will appoint and, in default of appointment, for the children of the plaintiff in unequal shares, sons taking twice the shares of daughters. Power is given to the plaintiff to appoint income to the extent therein provided to a surviving widow. The ultimate remainder under the settlement is for the general testamentary appointees of the plaintiff.

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[69] [1901] 2 Ch. 534.

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CHAPMAN'S SETTLEMENT TRUSTS, *In re*; CHAPMAN *v.* CHAPMAN.

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The present capital value of the trust premises is approximately £83,000, and the gross income amounts to about £4,000 per annum. The plaintiff has married the second defendant, and there is one child of the marriage, the first defendant, who was born on December 28, 1951. The plaintiff has since the date of the settlement succeeded, on his father's death, to a substantial fortune: so that he pays income tax (including surtax) on the settlement income at the maximum rate of 19s. 6d. in the pound, and, should he die tomorrow, estate duty would be leviable upon the corpus of his settled property at the rate of 65 per cent.

The scheme proposed is exhibited to the plaintiff's affidavit. Having regard to the view which we have formed upon it and the course which we think should now be taken, it is unnecessary to refer in detail to the scheme. Its broad effect is that the plaintiff proposes to surrender his life interest in one half of the trust funds, so as to accelerate the interests in reversion expectant on his death in that half of the fund (whether in accordance with the exercise of his power of appointment by deed or otherwise) and also to release that half of the trust funds from the power of appointment in favour of a widow and other powers of appointment mentioned in the scheme; but upon terms that the discretionary trusts during any part of the plaintiff's life as regards that half of the fund are wholly released or overridden and that the plaintiff's life interest in the other half of the trust fund is not thereby forfeited.

It will be seen that the general purpose and character of the scheme are similar to those in *In re Downshire*.[70] In this case the settlement was in fact made by the plaintiff himself. Mr. Buckley did not, however, contend (in our view rightly) that that was for present purposes a material circumstance. It is also to be observed that the terms of the protective trust are in this case such as to exclude any argument that the proposed surrender would not determine the plaintiff's right to enjoy any part of the income of the trust fund.

The scheme has been framed, as counsel frankly admitted, with an eye, as it were, on section 57 of the Trustee Act, 1925. Its form was intended to bring it within the scope of that section as it was sought to be construed. We are satisfied that the scheme is not within the competence of the jurisdiction which the section confers. In our judgment, what is proposed to be done in this case can no more fairly be described as a disposition or transaction in the "management or administration of the "property vested in the trustees" than could the proposals put forward in *In re Chapman.*[71] On the other hand, the present scheme is, in our view, of the same essential character as that in *In re Downshire.*[72] Here (as in the other case) the tenant for life desires and offers to give up his interest for his life in part of the settled property for the benefit of the class of persons to take after his death and so as to accelerate the interests of that class. The existence of the protective trusts stands in the way of his so doing; and the offer of the tenant for life is conditional upon his life interest in the rest of the settled property not being thereby destroyed.

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[70] Ante, 118.

In our judgment, therefore, the scheme is of a nature which it is competent for the court to sanction in exercise of its jurisdiction to approve compromises in the wide sense of that word which we have already indicated. It seemed, however, to us that the form of the scheme might require reconsideration so as to make it more appropriate for the court's consideration under its non-statutory jurisdiction; and it seemed that in other respects the tenant for life has not finally decided upon all aspects of the matter. We think it better, therefore, in this case to say no more about the scheme, but to refer it back to the judge, with liberty to the parties to amend the scheme in the meantime if and as they may be advised.

DENNING L.J. These three cases raise questions of great importance as to the jurisdiction of the Court of Chancery. It is said that the Court of Chancery has no jurisdiction to sanction acts which are not authorized by the trust instrument except in cases of emergency. That proposition is said to have been established by the decision of this court in *In re New.*[73] In my opinion the jurisdiction of the court is not so limited. It was certainly not so limited in the days of Lord Hardwicke L.C. He proceeded on the broad principle that the court had power to deal with the property and interests of infants, or other persons under disability, in a manner not authorized by the trust whenever the court was satisfied that what was proposed was most advantageous for them provided, of course, that everyone of full age agreed to it. I hope to show that that is the true principle today;

[71] Ante, 123.
[72] Ante, 118.
[73] [1901] 2 Ch. 534.

and for this purpose I will trace the history of the matter, for it is supported by the greatest names of English equity.

The first group of cases arose out of the differences which used to exist between real and personal property, both in regard to succession on intestacy (realty going to the heirs-at-law and personalty to the next-of-kin) and also to the power of testamentary disposition (personalty could be disposed of by will at the age of 17, but realty not till 21). The general rule in those days was that the trustees for an infant could not change the nature of an estate from personalty to realty, or vice versa, because that would prejudice the succession and also the power of disposition: see *Witter* v. *Witter*,[74] *per* Lord King. Nevertheless, it was held from the earliest days of equity that the court itself could sanction a change in the nature of an estate even though it did alter the succession. Thus in 1686, three years after the death of the father of equity, Lord Nottingham, we find Sir John Trevor M.R. declaring in *Earl of Winchelsea* v. *Norcliffe* [75] that if it was " for the benefit of the infant " to have money laid out in the purchase of land, the court could sanction the change of estate, and his opinion on that point was accepted by Lord Jeffreys L.C., who is said in equity matters to have been quite a good judge: see *Earl of Winchelsea* v. *Norcliffe*.[75] Fifty years later, in the days of Lord Hardwicke L.C., we find the court regularly exercising this jurisdiction. In 1739, when a guardian for an infant surrendered an old lease and took a new one which altered the descent, Lord Hardwicke L.C. sanctioned it because it " was the most beneficial purchase for the infant that " could be "; *Pierson* v. *Shore*.[76] In 1752, still in Lord Hardwicke L.C.'s time, the court sanctioned a purchase of land by trustees for an infant out of his personal estate, thus changing the nature of it, but inserted a proviso that the land was to be treated as personalty until the infant became 21: see *Bridges* v. *Bridges*.[77]

The best account, however, of what Lord Hardwicke L.C. did was given by his successor, Lord Northington L.C., who as Robert Henley, had one of the biggest practices in Lord Hardwicke L.C.'s court and succeeded him in 1761. He was himself a great lawyer and so described by Lord Eldon L.C. In 1762 he gave this account of the practice of the court: " It was said that " the nature of an infant's estate cannot be changed. That is a

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[74] (1730) 3 P.Wms. 99.

[75] 1 Vern. 435.

[76] 1 Atk. 480.

[77] (1752) (1887) 12 App.Cas. 693, note.

"matter of consequence and if there was any such rule laid down "by this court, I would acquiesce in it; but in my opinion it is "otherwise: the court has often changed it for the convenience "of the infant . . . where it is manifestly for the advantage or "convenience of the infant. The court has done it in many "cases, in making compositions, and *often contrary to the direc-"tion of the donor or testator*: as *where money is directed to be "laid out in freehold land, the court has, for conveniency, "ordered part to be laid out in leasehold*": *Inwood* v. *Twyne*.[78]

Forty years later, in 1801, we find Lord Eldon L.C. himself following the same practice in the important case of *Ashburton* v. *Ashburton*.[79] In that case the late Lord Ashburton gave his personal estate to his executors in trust to invest in mortgages of land or government securities, as they should judge best during his son's minority. When the son was 18, an opportunity arose of buying lands in Devon near the rest of the Ashburton landed property, and the trustees for the infant asked the court for liberty to use the personal estate in buying lands. When Mr. Romilly made the application Lord Eldon L.C. asked [80] "whether "there was any instance in which the court took it upon itself to "change the nature of the property in such a case, *where there "was no clause in the will authorizing it*." Counsel said that orders upon the subject had been made, and thereupon Lord Eldon L.C. sanctioned the purchase, but with the usual proviso that until the son was 21 the land should be treated as personal estate. Thereafter Lord Eldon L.C. adopted that form whenever the occasion required it, and he explained the jurisdiction on the ground that it was "for the benefit of the infant": see *Ex parte Phillips*.[81] Seventy-five years later Lord Selborne and Lord Macnaghten treated those cases as settling the law on the subject: see *Attorney-General* v. *Marquis of Ailesbury*.[82] The important thing to notice in all these cases is that the court did not proceed on the grounds of emergency or necessity, but only for the benefit of the infant, and it sanctioned the transaction, even though it was not authorized by the trust instrument, so long as it was for his benefit.

A similar principle was applied in the case of lunatics. It was laid down in 1749 by Lord Hardwicke L.C. in *Ex parte Marchioness of Annandale*,[83] by Lord Bathurst L.C. in *Ex parte*

[78] Amb. 417, 419.
[79] (1801) 6 Ves. 6.
[80] Ibid. 7.
[81] (1812) 19 Ves. 123.
[82] 12 App.Cas. 672, 682, 694.
[83] (1749) Amb. 81.

Grimstone,[84] and in 1887 in *Attorney-General* v. *Marquis of Ailesbury*,[85] when Lord Macnaghten said: "The leading principle, the paramount consideration, is the interest of the lunatic."

The second group of cases arose when money was needed for the maintenance and education of a child. Lord Hardwicke L.C. started this also. In 1748 a testator left property on trust for his wife for life and afterwards for his daughter, but said that the debts and incumbrances were to be paid out of income before his daughter received anything. Despite the words of the will, Lord Hardwicke L.C. declared that "the daughter must be allowed a maintenance out of the trust estate during the mother's lifetime": see *Revel* v. *Watkinson*.[86] That was followed by many cases where the court ignored an express provision for accumulation and ordered maintenance for children. It was done by Lord Bathurst L.C. in 1776 in *Cavendish* v. *Mercer*,[87] and by Lord Thurlow L.C. in 1779 in *Fendall* v. *Nash* [87a] and by Lord Loughborough L.C. in 1800 in *Greenwell* v. *Greenwell*.[88] In the last-named case Lord Loughborough L.C., who had a considerable reputation as an equity judge, was quite aware of the significance of overriding the direction to accumulate. When the application for maintenance was made to him, he said: "I fear if I should [order maintenance] it would be my will, and not the testator's," but he did it.

Seven years later Lord Eldon L.C. followed those precedents. He observed that "when there is an express direction for accumulation, it is strong to say, that the direction shall not have effect," but Sir William Grant M.R., under his direction, did that strong thing: see *Errat* v. *Barlow*.[89] Since his time it has been done repeatedly. It is obvious, of course, that the grant of maintenance to the father for the benefit of one or more of his children will reduce the amount coming to the others under the trust for accumulation, but nevertheless the court does it for the benefit of the children as a whole: see *Havelock* v. *Havelock*,[90] The jurisdiction does not rest on the presumed intention of the testator, as Pearson J. thought it did: see *In re Collins*,[91] nor on the construction of the will, as Farwell J. said on one occasion: see *In re Walker*.[92] Nor is it

[84] (1772) Amb. 706, 708.
[85] 12 App.Cas. 672, 688.
[86] 1 Ves.Sen. 93, 95.
[87] (1776) 5 Ves. 195, note.
[87a] (1779) 5 Ves. 197, note.
[88] 5 Ves. 194.
[89] (1807) 14 Ves. 202, 203.
[90] 17 Ch.D. 807.
[91] 32 Ch.D. 229.
[92] [1901] 1 Ch. 879.

confined to cases of emergency or necessity, for maintenance has been allowed to a father when the mother had ample means of her own to bring up the children: see *Haley* v. *Bannister*,[93] per Sir John Leach V.-C. The jurisdiction rests on the benefit of the children.

The third group of cases arises out of the power of the court to sanction compromises or compositions, that is, agreements between beneficiaries about their beneficial interests whereby those interests are changed and distributed between them differently from the directions of the testator or settlor. When all the beneficiaries are sui juris there is, of course, no difficulty. They can by agreement between themselves put an end to the trust, or, with the consent of the trustees, they may alter or vary the trusts as they please. When they are not all sui juris, but some are infants or under disability and others are unborn or unascertained, the bargain cannot be implemented without the consent of the court, for the simple reason that they cannot consent themselves, and the court, as parens patriae must consent on their behalf. In giving or withholding its consent, the function of the court is to protect the interests of those who cannot protect themselves; and so long as they are adequately protected, the court will as a rule give its consent. This was common practice in Lord Hardwicke L.C.'s time. That appears from the passage I have already quoted from Lord Northington L.C.'s judgment in *Inwood* v. *Twyne*,[94] when he said that the court had "done "it in many cases, *in making compositions*, and often contrary to "the direction of the donor or testator." It has been common practice ever since. It was explicitly stated in 1864 by Turner L.J. in *Brooke* v. *Lord Mostyn*[95] in these words: "That this "court has power to compromise the rights and claims of infants "and persons under disabilities, when those rights and claims are "merely equitable, has not been and cannot be disputed. It is a "power which has continually been exercised by the court, and "results almost necessarily from the jurisdiction which the court "exercises over trustees. In the exercise of that jurisdiction the "court may in general order the trustees to deal with the trust "property in *whatever mode it may consider to be for the benefit* "*of the cestuis que trust who are infants or under disabilities.* ". . . I have thought it right to make these observations because "I consider it of great importance that no doubt should be cast

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[93] (1820) 4 Madd. 275.

[94] Amb. 417, 419.

[95] 2 De G.J. & S. 373, 415.

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"upon this power of the court . . . the rights of infants and "incapacitated persons must in many cases be sacrificed if the "power be not maintained."

This jurisdiction is not confined to cases where there is a dispute about the extent of the beneficial interests, nor to cases of emergency or necessity, but extends wherever there is a bargain about the beneficial interests which is for the benefit of the infants or unborn persons. It was exercised in striking fashion in 1902 in *In re Trenchard*,[96] where it was argued that "the court cannot sanction a compromise (that is, a bargain) "which is directly opposed to the testator's wishes," but Buckley J. did sanction it.

Finally, I come to a case which formulates the one general principle which emerges from the cases. It is *In re Wells*[97] (better reported in the Law Journal[98] and The Law Times[99]), where there was a trust for such members of a class as should survive a certain event, and they desired to exchange those contingent rights for vested indefeasible interests. That was nothing more nor less than putting an end to the trust contrary to the directions of the testator: but Farwell J. sanctioned it on behalf of the infants and unborn sons interested. He refused to put the decision on the ground that the scheme was a compromise. He said that it was not a compromise. He referred to the old cases and came to the conclusion that[100] "they went on the footing that what was done was for the benefit "of the infants." That simple principle was the basis of the decision. It should be noted that Farwell J. quoted another group of cases, namely, those in which the court has allowed policies comprised in a settlement to be surrendered, when there has been difficulty in keeping up the premiums. He added that "it may be said that is ex necessitate rei: but still the "principle is the same, namely, the benefit of the infants."

To conclude this review of equitable jurisdiction, I should like to call to witness one whose knowledge of equity has never been surpassed. I refer to Lord Parker, who as junior counsel in *In re New*[1] put an argument which seems to me to sum up both principle and practice in a way which is very appropriate to each of these cases we have to decide today: "We all agree," he said ," that it is to the advantage of everyone that this scheme "should be carried out, and the only difficulty is that some of

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[96] [1902] 1 Ch. 378, 382.

[97] [1903] 1 Ch. 848.

[98] 72 L.J.Ch. 513.

[99] 88 L.T. 355.

[100] [1903] 1 Ch. 854.

[1] [1901] 2 Ch. 534, 543.

"the beneficiaries are not sui juris and, therefore, cannot consent. If the broad principle were adopted that where "trustees cannot do a particular thing the court cannot do it, "the advantages arising out of the equitable jurisdiction of the "Court of Chancery would disappear. But, as a matter of "practice, the court has been in the habit of acting on the "principle that it has power to deal with the property of cestuis "que trust who are under disability, that is, *in a proper case*— "*on a special case being made, although not provided for in* "*the trust—when the court is satisfied that what is proposed* "*is most advantageous to those cestuis que trust.*" There can be no doubt that the argument of Mr. Parker helped greatly to persuade the court to give its consent, as it did there, to a change of investment not authorized by the trust. Romer L.J. expressed the judgment of the court in very guarded language, which was sufficient for the decision of that case. He treated it as an emergency case, but not in such a way as to exclude other cases. The Chancery judges of that time did not understand that *In re New* [2] confined their jurisdiction to emergency cases; for otherwise Buckley J. would not have consented to the scheme in *In re Trenchard*,[3] nor Farwell J. to the scheme in *In re Wells*.[4] The case of *In re Tollemache* [5] creates no difficulty, because the scheme there was for the benefit of the adults, not for the benefit of the infants.

It is noteworthy that whenever the court has, of its own motion, placed limitations on its own jurisdiction—as it did on a few occasions in the second half of the nineteenth century—the legislature has intervened to remove those limitations. Thus, when it was held that a court of equity could not discharge a restraint on anticipation, *Robinson* v. *Wheelwright*,[6] the legislature intervened to permit it, whenever it appeared to the court to be for the benefit of the married woman: see section 39 of the Conveyancing Act, 1881, and section 169 of the Law of Property Act, 1925. Again, when it was held that a court of equity could not order a sale of heirlooms, *D'Eyncourt* v. *Gregory*,[7] the legislature intervened to permit it by order of the court: see section 37 of the Settled Land Act, 1882, and section 67 of the Settled Land Act, 1925. So, also, when it was held that a court of equity could not authorize a change of investment merely on account of benefit to the estate, *In re*

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[2] [1901] 2 Ch. 534.
[3] [1902] 1 Ch. 378.
[4] [1903] 1 Ch. 848.
[5] [1903] 1 Ch. 457, 955.
[6] (1856) 6 De G.M. & G. 535.
[7] 3 Ch.D. 635.

New [8] and *In re Tollemache*,[9] the legislature intervened to permit it, whenever it was in the opinion of the court expedient: see section 64 of the Settled Land Act, 1925, and section 57 of the Trustee Act, 1925. These statutory provisions should not be read as delimiting the jurisdiction of the court, but rather as removing limitations which the court had imposed upon itself. They show that the judges of the late nineteenth century made a mistake in tying their own hands in these matters. We ought not to make the same mistake today.

In applying this jurisdiction to the three cases here in hand, the first question is whether the court can give its consent to the scheme when the avowed object of it is to avoid death duties. To that question the answer is "Yes." Just as people of full age and understanding are entitled so to arrange their affairs as to reduce the incidence of death duties on their successors, so also the court will permit the receiver of a lunatic to do it: *In re C. W. M.*[10] If the court goes thus far, there is no reason why it should not give its consent to a scheme on behalf of infants for the like purpose. After all, the very object of the scheme is to benefit the infants, and the court, as their protector, ought to consent on their behalf unless it owes some overriding duty to protect the revenue, which I do not think it does.

Once that question is out of the way, there is no reason why the court should not consent to the proposed scheme for the Downshire estates. It is a composition where the persons sui juris have agreed upon a re-arrangement of their beneficial interests so as to save death duties, and all that is needed is the consent of the court on behalf of unborn or unascertained persons. Their interests arise only under a protective trust and have been amply covered by insurance. It means, no doubt, a departure from the trusts declared by the settlor, because the protective trusts are struck out, but that is no reason for not sanctioning the composition. It is only because the trusts are being altered that the consent of the court is required. I think the court should give its consent.

The proposed scheme for the Chapman settlement is more troublesome. We are told that the lawyer who drew up the deed made a mistake. He did not have in mind the statutory definition about property passing "on the death" for the purpose of death duties; and he included a discretionary trust for common maintenance when he ought to have omitted it. He ought to have left the children to receive maintenance equally instead of giving the trustees a discretion to grant more to one than the others. It is a small mistake, but it means a difference of £30,000 in death duties. The mistake cannot be remedied under the strict doctrine of rectification because it is not a mistake in expressing the settlor's intentions, but only a mistake as to the legal consequences. Nevertheless, I do not myself see why the mistake should not be corrected by the settlors themselves. This is not like a will which the testator, being dead, has no power to alter. In the case of a will it has been held that the court cannot correct a solicitor's mistake, even though it is quite obvious that he has made one: *In re Horrocks*[11]: and even though it means defeating the testator's intentions altogether: *Chichester Diocesan Fund & Board of Finance (Incorporated)* v. *Simpson.*[12] I see no reason why the treatment thus meted out to the dead should be extended to the living also. This is a voluntary settlement where the settlors are still alive and able to speak for themselves. If their lawyer has made a mistake and drawn up the settlement so as to produce consequences which were never intended, why should not the settlors be at liberty to correct the mistake? They have provided all the money for the settlement and all they desire to do is to see that it benefits their grandchildren in the best possible way. Why should they not do it?

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[8] [1901] 2 Ch. 534.

[9] [1903] 1 Ch. 457, 955.

[10] [1951] 2 K.B. 714; [1951] 2 All E.R. 707.

In the case of an agreement between two parties of full age, the two can correct the error themselves by making a new agreement to cover the future. The court will not, of course, rectify the agreement so as to cover the past, see *Van der Linde* v. *Van der Linde*[13] and *Whiteside* v. *Whiteside*,[14] but the two parties together can do it by agreement so as to cover the future. Indeed, it was done by the parties themselves in those very two cases, and they did it expressly to avoid tax. Why should not the same apply to a voluntary settlement? The only difficulty is that some of the persons who are or may hereafter be interested are under age or unborn and cannot give their consent. But that is just where the Court of Chancery is able to exercise its most beneficent jurisdiction. It can give its consent on their behalf to cover the future when it is satisfied that the proposal is most advantageous to them. The correction does not speak from the

[11] [1939] P. 198; 55 T.L.R. 444; [1939] 1 All E.R. 579.

[12] [1944] A.C. 341; 60 T.L.R. 492; [1944] 2 All E.R. 60.

[13] [1947] Ch. 306.

[14] [1950] Ch. 65; 66 T.L.R. (Pt. 1) 126; [1949] 2 All E.R. 913.

C. A.
1952

DOWNSHIRE SETTLED ESTATES, *In re*; MARQUESS OF DOWNSHIRE *v.* ROYAL BANK OF SCOTLAND.

CHAPMAN'S SETTLEMENT TRUSTS, *In re*; CHAPMAN *v.* CHAPMAN.

BLACKWELL'S SETTLEMENT TRUSTS, *In re*; BLACKWELL *v.* BLACKWELL.

Denning L.J.

date of the original deed, as it would in the case of rectification, but only from the date of the correction. The grandparents will have to live yet another five years for the children to get the benefit of it, but they should at least be able to correct it to that extent.

I find that the judges in the past have interpreted in a liberal fashion the power of equity to relieve against mistakes. For instance, in *James* v. *Couchman* [15] North J. allowed a settlor to alter a voluntary settlement so as to correct his lawyer's mistake. I think we should interpret its power liberally today. I do not suggest, of course, that the court would sanction a scheme to alter trusts, so as to overcome the intentions of the legislature as disclosed in subsequent legislation. It would no doubt refuse it, but it would do so in the exercise of its discretion, not for want of jurisdiction. Even if the settlement cannot be corrected on the ground of mistake, I think that the scheme can be brought within *In re Wells*.[16] Each of the infants gives up the chance of a contingent greater allowance in return for the certainty of a proportionate share. The only difference between *In re Wells* [16] and the present case is that the benefit to the infants in *In re Wells* [16] was a direct result of the composition, whereas in this case it is an indirect result by the elimination of death duties. Such a distinction cannot go to jurisdiction, but at most to discretion; and as matter of discretion this scheme deserves the discretion of the court as much as *In re Wells* [16] unless the elimination of death duties is a bar, which we have decided in *In re Downshire* it is not.

If the Court of Chancery should refuse its consent to this scheme the paradoxical situation will be reached that the court, whose function it is to protect the interests of the grandchildren, shows itself to be their own worst enemy. The grandparents are ready and anxious to correct the mistake. So is everyone else. If the grandchildren and unborn persons were at liberty to consent, any prudent adviser would tell them that they ought to consent because the scheme is so greatly advantageous to them. Is the court to stand in the way and not give its consent? Not so long as it is inspired by the principles laid down by Lord Hardwicke L.C. I think that consent should be given in the Chapman case.

The proposed scheme for the Blackwell estates is less troublesome. The settlor, who is also tenant for life under a protective trust, desires to release his interest in one-half of the trust funds and to accelerate the interests of his children. That is clearly for their benefit, and everyone else agrees to it. The only difficulty is that it squeezes out the remoter issue and a possible second wife who might take under the protective trust: but provision can be made to cover those contingent interests. The scheme falls within the same principle as the Downshire scheme and should be sanctioned when it has been put into proper form.

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[15] (1885) 29 Ch.D. 212.

[16] [1903] 1 Ch. 848.

I would therefore myself allow the appeal in all three cases; and I am the more ready to do so because I am told that the Chancery judges in chambers have in the past exercised their jurisdiction in similar cases in a very beneficent manner, and this is confirmed by the approval given to the schemes in *In re Salting*,[17] by Eve J., in *In re Mair*,[18] by Farwell J., and in an unreported decision of Simonds J. in 1938 under the inherent jurisdiction which was drawn to our attention. The jurisdiction has been so freely exercised that the rejection of the schemes in the present cases has taken Lincoln's Inn by surprise, so much so that many proposed schemes have been held up pending our decision. The practice of the profession in these cases is the best evidence of what the law is; indeed, it makes law. It would be most disturbing if we were to say that the Chancery judges for many years have been acting without jurisdiction. What would be the result? I suppose that the schemes could be ignored by the Revenue and by all persons not sui juris, which would be a very unsatisfactory state of affairs. It is not right to unsettle the jurisdiction of the court on these matters unless some high principle demands it, and I see none. I whole-heartedly agree with my Lords in allowing the appeals in *In re Downshire* and *In re Blackwell*, and for myself I would allow the appeal in *In re Chapman* also.

In re Downshire Settled Estates and In re Blackwell's Settlement Trusts, appeals allowed.
In re Chapman's Settlements Trusts, appeal dismissed. Leave to appeal to the House of Lords.

Solicitors: *Gustavus Thompson & Sons, Blundell; Baker & Co. for Wheldon, Houlsby, Moore & Armstrongs, South Shields; Neish, Howell & Haldane; Baileys, Shaw & Gillett; Treasury Solicitor.*

B. A. B.

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[17] [1932] 2 Ch. 57.

[18] [1935] Ch. 562.

1952
Dec. 17,
18, 19.

Upjohn J.

OTTER *v.* CHURCH, ADAMS, TATHAM & CO.

[1949 O. 166.]

Contract—Solicitor and client—Breach of duty—Negligence—Failure to advise client before death that his interest in certain property was entailed—Measure of damages—Time at which damages to be ascertained.

In 1941, the plaintiff, as guardian of her son M. then aged 18, engaged the defendants as solicitors to advise her on the extent and nature of his interest in certain settled property which had recently fallen into his possession. The defendants informed her that M. upon attaining 21 would become entitled absolutely to the property in question. In fact, M's interest in it was an equitable interest in tail male with remainder over in favour of his uncle.

In December, 1944, the plaintiff as agent for M. informed the defendants that he had attained 21 and that he was serving with the Royal Air Force in India. She requested the defendants to advise him whether any and what steps should be taken to transfer the settled property to him. At an interview and by a subsequent letter she was advised by the defendants that the transfer of the settled property could await the return of M. to England, and that this was the most convenient course to adopt. Subsequently she informed M. of the advice which had been tendered by the defendants.

On May 14, 1945, M. was killed in a flying accident in India. He died intestate and a bachelor and had not before his death executed a disentailing assurance, or will relating to the settled property, which accordingly passed to his uncle and did not fall into his estate.

After M.'s death it was discovered that the defendants had mistaken the nature of M.'s interest in the settled property.

The plaintiff as sole administratrix of M.'s estate brought an action for damages against the defendants, and claimed that they in breach of their duty to exercise care and skill as solicitors had (a) stated or implied that no steps need be taken by M. to make the settled property his own until his return to England, and (b) failed to advise M. that having attained 21, he ought to execute a disentailing assurance relating to the settled property or a will in accordance with section 176 of the Law of Property Act, 1925, if he wished to ensure that the settled property would form part of his estate on his death.

The plaintiff further claimed that in consequence of such negligence M.'s estate had suffered damage and had been decreased in value.

Held, that the defendants were guilty of a breach of contract, and that the damages which might fairly and reasonably be expected to flow from such breach were not limited to the nominal

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[Reported by J. A. Griffiths, Esq., Barrister-at-Law.]

damages which the deceased could have recovered in his own lifetime; but were to be ascertained at the time when the damage accrued, that is, after the death of M.; and that as M. had been deprived of the opportunity of increasing his estate by making the settled property his own absolutely, the measure of damages was the loss to M.'s estate occasioned by the passing of the settled property to the next tenant in tail, due allowance being made for the possibility that M. on being properly advised might not have disentailed.

ACTION.

The plaintiff, as sole administratrix of the estate of her son Robert Colin Michael Otter ("Michael") who was killed on active service on May 14, 1945, intestate and a bachelor, brought an action for negligence against the defendants, who were solicitors. The plaintiff claimed that the defendants and in particular the partner Ralph Perceval Tatham, were negligent in that, in breach of their duty to exercise care and skill as solicitors, they failed to advise the plaintiff, acting as the agent of her son Michael, that his interest in certain settled property was an entailed interest and that Michael, having recently attained the age of 21, was in a position to disentail and make the property his own absolutely.

The plaintiff was the widow of Robert Edward Otter, barrister-at-law, sometime judge of the High Court in Burma, who died on October 14, 1932, leaving two children of the marriage surviving him, namely, Michael, who was born on September 18, 1923, and a daughter Jennifer.

Under the limitations of clause 13 of the will of one Catherine Elizabeth Younge, dated February 6, 1899, upon the death of one William Henry Otter in 1941, Michael, his father Robert E. Otter having died in 1932, became entitled in possession to certain freehold property [" the settled property "] for an equitable interest in tail male with remainders over.

Shortly after the death of William Henry Otter in 1941, the plaintiff retained and employed the defendants to advise her both on her own behalf and in her capacity as guardian of Michael in connexion with the settled property and with reference to the nature of his interest in it, and the defendants undertook to advise the plaintiff accordingly.

The defendants thereupon entered into correspondence with the solicitors to the estate of the testatrix, who, on August 21, 1941, wrote the following letter to the defendants and enclosed a copy of clause 13 of the will: " . . . In our view [Michael] " is entitled absolutely to the settled estates unless his father "who was tenant in tail barred the entail in his lifetime. If "Mr. Justice Otter did bar the entail then it seems to us the "settled estates would fall into the estate of Mr. Justice Otter "and the destination of the settled estates would be governed "by his will if he made a will.

"Please let us know:—

"(1) Whether you agree with our construction of the clause. "(2) Whether Mr. Justice Otter did bar the entail. . . ."

On September 1, 1941, the defendants replied: "With "reference to your letter of the 21st ultimo, we have considered "same and we agree with your conclusions but, of course, we "have only seen an extract from the will and assume that there "is nothing else in the will affecting the question. If there is "any doubt about it then a short case might be put to counsel. ". . . The boy [Michael] will be 18 this month."

After further correspondence, in the course of which the defendants were supplied with a complete copy of the will of the testatrix, the defendants, on September 9, 1941, wrote the following letter to the plaintiff: ". . . I have had further letters "from [the solicitors to the estate of the testatrix] and I think "it is clear from the documents that they have sent me that "your son, on attaining 21, will be entitled to certain settled "property . . ." which was then set out.

In 1942, on leaving school, Michael joined the Royal Air Force. In 1943 he trained as a flying officer in South Africa, and later that year he was transferred to India where he performed navigational duties.

About the middle of December, 1944, the plaintiff informed the defendants (as the fact was) that Michael had attained 21 and that he was serving with the Royal Air Force in India. As agent for Michael she asked the defendants to advise Michael whether any and what steps should be taken to transfer the settled property to him, and by taking such action she impliedly retained and employed the defendants to advise generally concerning Michael's interest in the settled property. One Ralph P. Tatham, a partner, orally advised her that the transfer of the settled property could await the return of Michael to this country and that this course would be the most convenient one to adopt.

On December 27, 1944, the defendants wrote the following letter to the plaintiff: "I have heard from [the solicitors to "the estate of the testatrix] with reference to your son's legacy "and they agree that it will be better to wait until his return "to this country before the trust assets are transferred to "him . . ." Shortly after receipt of this letter the plaintiff wrote to Michael and informed him of its contents and effect.

On May 14, 1945, Michael was killed in a flying accident in India. He had not executed a disentailing assurance before his death; and accordingly, as he died intestate and a bachelor, the settled property passed to his uncle, Francis Lewis Otter, who survived him, the next tenant in tail under the will.

After the death of Michael the plaintiff, believing that the settled property formed part of his estate and devolved on her as his sole next of kin, was minded to make over the property to her daughter Jennifer. It was thought advisable to take the opinion of counsel, who pointed out that under the limitations of clause 13 of the will and in the events which had happened the property had passed to Francis Lewis Otter, and that accordingly the plaintiff's wishes could not be fulfilled.

By the amended statement of claim, the plaintiff claimed that in giving the oral advice at the interview in December, 1944, and in writing the letter dated December 27, 1944, the defendants acted negligently in the discharge of their duties to the plaintiff and Michael as their solicitors; that such negligence consisted in (a) stating or implying (as the letter in question did) that no steps need be taken by Michael to make the settled property his own until his return to England, and (b) the failure of the defendants to advise the plaintiff and Michael that, now that Michael had attained the age of 21, he ought to execute a disentailing assurance relating to the settled property or a will devising it in accordance with section 176 of the Law of Property Act, 1925, if he wished to ensure that the settled property would form part of his estate on his death.

The plaintiff further claimed that in consequence of such negligence on the part of the defendants (a) Michael refrained from executing a disentailing assurance relating to the settled property or devising it by will in accordance with section 176 of the Act of 1925, whereby it was lost to Michael and his estate, or, alternatively, that Michael was deprived of the opportunity of considering whether or not he should execute such a disentailing assurance or will . . . (d) the estate of Michael had suffered damage and been decreased in value.

The defendants by their defence denied the allegations contained in the statement of claim.

The value of the settled property was agreed for the purposes of the action to be £7,132.

C. Montgomery White Q.C. and *Hugh MacMaster* for the plaintiff. It is plain that the defendants failed in their duty to the plaintiff and Michael, and, accordingly, they were guilty of a breach of contract: see *Nocton* v. *Ashburton (Lord).*[1] In consequence of such breach Michael's estate lost the whole of the settled property and Michael was deprived of the opportunity of making the property his own absolutely.

The court will assume that a person will act for his own best financial interests, especially when he is advised what are those interests.

The plaintiff as administratrix of Michael's estate is entitled to substantial damages to compensate for the loss of the settled property.

[They also referred to *Chaplin* v. *Hicks.*[2]]

P. Ingress Bell Q.C. and *I. J. Lindner* for the defendants. The defendants deny that they were negligent but, even if they were, the damages which flow from the breach of contract are only nominal.

The plaintiff, as administratrix of Michael's estate, can have no better right than Michael himself would have possessed had he lived. In those circumstances the damages must necessarily be nominal, for Michael on learning of the true position could have made the property part of his estate by executing a disentailing assurance or devising it by his will. The plaintiff is attempting to recover damages which result, not from a breach of the defendants' duty, but by virtue of Michael's death. For the general principle involved, see *Lockier* v. *Paterson*[3]; *Valpy* v. *Oakeley*[4]; *Beckham* v. *Drake.*[5]

On the question of the principle concerning the award of damages for breach of contract, see *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld., Coulson & Co. Ld. (Third Parties).*[6]

Even if the plaintiff is not restricted in damages to the amount which Michael could have recovered in his own lifetime, even so damages are nominal, for it does not necessarily follow that Michael would have made the property his own absolutely; he might have wished that upon his death without issue it should devolve upon another male member of the Otter family as prescribed under the limitations of the testatrix's will.

[1] [1914] A.C. 932, 956.

[2] [1911] 2 K.B. 786.

[3] (1844) 1 C. & K. 271.

[4] (1851) 16 Q.B. 941.

[5] (1849) 2 H.L.C. 579.

[6] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997.

[*Saffron Walden Second Benefit Building Society* v. *Rayner* [7] was also mentioned.]

Montgomery White Q.C. in reply. The plaintiff is suing on a breach of contract committed during the deceased's lifetime, and therefore as his personal representative she has a good cause of action at common law: see Williams on the Law of Executors and Administrators, 12th ed., p. 500. It has never been suggested that where damage does not occur during the deceased's lifetime, but flows naturally from the breach of contract after his death, it is not recoverable. The fact that the damage accrued after Michael's death does not prevent his personal representative from obtaining more than nominal damages.

[UPJOHN J. Is not the real question at issue the time at which damages are to be assessed?]

Yes. The right of action is vested in the personal representative, and the damages must be ascertained in accordance with the principles affecting damages for breach of contract at the time the damage accrued. In the present case it accrued after the death of the deceased, and the measure of damages must be such as might be expected naturally to flow from the breach. The defendants must be taken to have known that failure to give Michael correct advice might lead on his death to his estate losing the settled property. The damage accrued at a time when it was impossible for Michael to mitigate it, and accordingly his personal representative is entitled to substantial damages for the loss suffered by his estate.

[*Raymond* v. *Fitch* [8] and section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, were also mentioned.]

UPJOHN J. [having stated the facts:] The law upon the duty of a solicitor who undertakes to advise a client may be summed up in one sentence which I take from the well-known passage in the speech of Lord Haldane L.C. in *Nocton* v. *Ashburton (Lord)* [1]: "My Lords, the solicitor contracts with his client to be "skilful and careful. For failure to perform his obligation he "may be made liable at law in contract or even in tort, for "negligence in breach of a duty imposed on him."

Mr. Tatham was neither skilful nor careful. He completely misread clause 13 of the will of Miss Younge. That was in a perfectly ordinary form, the effect of which should be known and understood by every solicitor and, indeed, by every student of law who has received elementary instruction in the law of real property.

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[7] (1880) 14 Ch.D. 406.

[8] (1835) 2 Cr.M. & R. 588.

[1] [1914] A.C. 932, 956; 30 T.L.R. 602.

The evidence may be summarized thus: in December, 1944, Michael having attained 21, acting through and by his mother as his agent—he, of course, being away on service for his country—consulted Mr. Tatham and asked for advice on what steps, if any, he should take to transfer to himself the settled estates. He was told that the matter was not urgent and that it could wait until his return. That was, I suppose, in the circumstances, as bad a piece of advice as any solicitor could give to his client. Mr. Tatham knew that Michael was engaged upon the dangerous occupation of flying during the war in the Royal Air Force. Mr. Tatham should have informed him that the property was entailed and that if he died on active service the estates would pass to his uncle, the next tenant in tail. He did no such thing. Michael was allowed to assume that the property belonged to him absolutely. He should have been told that it was possible to reduce the property into his own ownership, to make it his own, in one of two ways, either by making a will or by executing a disentailing assurance, in which case if he did either of these two things then, should he unhappily be killed on active service, the property would not pass to his uncle but would remain as part of his own estate.

It was argued that Mr. Tatham, having come to an admittedly erroneous conclusion on the true construction of the will in 1941, was under no liability to reconsider the matter in 1944. It was said that he owed no duty to Michael because, when he formed the erroneous conclusion in 1941, he was not acting for Michael; he was acting for Michael's mother in her capacity as guardian; and that, therefore, he was apparently entitled to assume that what he had considered in 1941 was correct and that he was entitled to give Michael advice on the basis that the opinion he had formed in 1941 was the true view. I reject that argument entirely.

When a solicitor undertakes to advise his client, in this case a young man who had just attained 21, and is specifically asked what steps, if any, his young client should take with regard to the transfer to himself of a specific piece of property, it is the solicitor's duty fully to inform himself of the nature of the property with which the client is concerned. If, as in the present case, the solicitor prefers to rely on some information that he received in 1941, and if he chooses to rely on the erroneous views he then formed on the nature of his client's interest after he has perused the relevant documents, he cannot conceivably escape liability by saying that when he was originally considering the matter, he owed no duty to his client. His failure to advise his client correctly was due to the fact that he advised him without properly informing himself of the true nature of his client's interest.

In truth, as I did not see Mr. Tatham in the witness box, I do not know what he had in mind when he advised his client. His advice may have been given recklessly without pausing to consider what was the true nature of his client's interest. He may have refreshed his mind by looking at the earlier correspondence in 1941 before the interview with Michael's agent, the plaintiff. He may, for all I know, have taken and kept a copy of clause 13 of the will, and he may have perused it again and again misconstrued it. All that is a matter of speculation, and it matters not what Mr. Tatham did. What is clear is that in advising his client, in the circumstances he acted neither skilfully nor carefully. He led his client to believe he was absolutely entitled and never told him that he was only a tenant in tail or informed him of the peculiar nature of that estate.

In the result, I am satisfied that Mr. Tatham was grossly negligent in the advice he tendered to his client through his mother, the plaintiff, in 1944, and that he was negligent both at the interview and in the letter he wrote to the plaintiff following upon that interview on December 27, 1944.

In principle, therefore, the plaintiff has established a breach of contract by the defendants, and the question arises what is the measure of damages. Mr. Ingress Bell submitted to me an attractive argument, which proceeded on these lines: he submitted that a personal representative can have no higher or better rights than the person he represents, and that, therefore, she can claim no greater damages than the deceased could have claimed in his own lifetime. It was then truly pointed out that damages in the deceased's lifetime must necessarily have been nominal, because the mistake having been discovered, it could be rectified at a stroke of the pen. Mr. Bell submitted forcibly that the plaintiff was, in effect, attempting to recover damages which resulted not from the solicitor's breach of duty, but by virtue of the death of the deceased.

The matter is admittedly free from authority. Mr. Bell cited three cases: the first, *Lockier* v. *Paterson*,[2] was a decision dealing with the rights of a personal representative in an action of tort and does not really touch upon this point; the next, *Valpy* v. *Oakeley*,[3] again does not really touch upon the point I have to consider; and, finally, *Beckham* v. *Drake*,[4] contains a useful discussion of the general principles affecting this question but gives me little guidance on the particular problem before me.

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[2] 1 C. & K. 271.

Mr. Montgomery White, on the other hand, submitted that what vests in the personal representative is the right of action which was previously vested in the deceased; and he referred to *Raymond* v. *Fitch*,[5] where the judgment of Lord Abinger shows that, as a matter of common law, all choses in action which are not of a purely personal nature, such, for example, as an action for slander, survive and pass to the personal representative; and, indeed, that is not disputed.

"Accordingly," submitted Mr. Montgomery White, "the "right of action being vested in the personal representative, "what is the measure of damages?"; and he pointed out that the measure of damages must be such as might be expected naturally to flow from the breach. He submitted that that was the true test; and that it was not right to say that damages can be no greater than those which the deceased could have recovered in his own lifetime. He put his case, in a sentence, thus: there is the right of action in the personal representative. One has to ascertain the damages in accordance with principles affecting damages for breach of contract at the time that the damage accrues. I accept that submission.

What, then, is the proper measure of damages in the present case? I was referred by Mr. Bell to the well-known rule in *Hadley* v. *Baxendale* [6] as expounded in the more recent decision of *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld., Coulson & Co. Ld. (Third Parties)*,[7] which established that damages for breach of contract should be such as would naturally be expected to flow from the breach, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it. It seems to me impossible in this case to apply that latter test having regard to the nature of the breach of contract. Therefore, I have to consider what are the damages which may naturally be expected to flow from the breach.

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[3] 16 Q.B. 941.

[4] 2 H.L.C. 579.

[5] 2 Cr.M. & R. 588.

[6] (1854) 9 Exch. 341.

[7] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997.

It is perfectly true that if Michael had continued to live damages would have been nominal. Are they, however, to be limited to the damages which he could have recovered in his own lifetime, as Mr. Bell submitted? Not in my judgment. It is contrary to common sense to suppose that damages in a case such as this must only be nominal merely because, had the mistake been discovered in the lifetime of the deceased, it could have been rectified. The true method of approaching the problem, in my judgment, is this: if the mistake was discovered in Michael's lifetime it was his duty, of course, to mitigate damages, and, indeed, reduce them to a nominal sum by executing a disentailing deed if he so desired; but it may well be that the mistake is not discovered until after his death. If the mistake is not discovered till after his death, Michael has been deprived of the opportunity of increasing his estate by executing a disentailing assurance relating to the settled property, and, therefore, upon his death, his estate may be diminished by that amount.

To take one example only, suppose that the mistake had been discovered in the lifetime of Michael. He is informed of the mistake, and he is informed that he can do one of three things: he can let matters rest as they are, in which case upon his death without male issue the settled property will pass from him to another branch of the family; alternatively, he can execute a disentailing assurance and the property will become his; and in the further alternative he can execute a will making the property his own upon his death. Let it be assumed that, on being informed of that, he instantly sends an urgent message home: "Please send out for me a disentailing assurance. I "desire to reduce this property into my own ownership." A disentailing assurance is produced, but, unfortunately, before it reaches him, and he can sign it, he is killed instantly. Can it in those circumstances be seriously suggested for one moment that his personal representative is not entitled to sue for the diminution of his estate by reason of the solicitor's breach of duty? In my judgment, it cannot seriously be suggested that that is the law, and I am not bound to hold that damages in this case are only nominal merely because the deceased could only have recovered nominal damages in his lifetime.

What, then, is the true measure of damages? The relevant facts upon that question seem to be these: it was certainly more than a remote possibility that Michael would be killed while on active service, and, therefore, damages might naturally be expected to flow from the failure to give proper advice. Mr. Bell submitted that, even upon the footing that he was wrong upon his first point, viz., that the personal representative could not claim greater damages than the deceased could have claimed in his own lifetime, even so damages are nominal. I reject that argument. In the circumstances of this case, there was a serious possibility that the failure to give him correct advice would lead to his estate losing the whole of the settled property.

Apart from that consideration, what are the other relevant circumstances? They seem to me to be these: this property was not what I may call the Otter mansion. Had it been, one can imagine that Michael might well have wished it to descend to his uncle and male relations on his father's side rather than that he should bring it into possession for the benefit even of his mother and his sister; but to Michael this was no more than a piece of income bearing property in the neighbourhood of Sheffield worth about £7,000. That consideration makes it perhaps rather unlikely that he would have thought it right to allow the property to devolve on his uncle and cousins. But I must bear in mind that he might have taken that view.

On the other hand, had the plaintiff been informed that a disentailing assurance or a will was necessary to preserve the property for her family—that is to say, herself and her daughter—she would undoubtedly, according to her evidence, which I believe, have advised her son to make a will leaving everything to his sister Jennifer; in law she would have advised her son to make the property his own; probably the son would have acted upon his mother's advice; but, there again, he might not and I must bear that possibility always in mind.

There is also this further consideration: the settled property was worth at his death some £7,132. That is an income-bearing property and that would have borne income over the last seven years since his death, income not on quite £7,132, because of the incidence of estate duty, but, nevertheless, the value of the property which his estate has lost is substantially in excess of £7,000.

Bearing all those factors in mind, what is my duty ? It is difficult to estimate damages when one has to speculate upon the action which Michael would have taken had he known the truth, but that difficulty is no bar to the assessment of damages. That was finally established in the well-known case of *Chaplin* v. *Hicks*.[8]

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[8] [1911] 2 K.B. 786; 27 T.L.R. 458.

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I have to make up my mind as best I can, and I do so by awarding the plaintiff in her capacity as the administratrix of Michael £6,500.

Judgment for the plaintiff.

Solicitors: *Steadman, Van Pruagh & Gaylor; Hair & Co.*

In re KENDREW. HIRD *v.* KENDREW AND OTHERS.

[1952 K. 374.]

C. A.

1953
Feb. 6.

Jenkins and Morris L.JJ. and Vaisey J.

Will—Conditional gift—"If continuing in service" with testatrix's husband—Marriage of husband and legatee—Prenuptial deed agreeing to remain in service for life.

Subject to a life interest to her husband, a testatrix bequeathed her freehold house with furniture and effects to her housekeeper absolutely "if she continues in the service of the survivor of myself "and my husband." She also gave an annuity to the housekeeper "if "still in the service . . . of myself and my said husband at the time "of his death." The testatrix predeceased her husband, and after her death the housekeeper married the widower. Before they married they made an agreement under seal whereby the housekeeper agreed to serve and the husband agreed to employ the housekeeper during the remainder of their joint lives, he paying her £52 per annum.

Held, (1) that on the true construction of the gifts and in the events which had happened, the housekeeper in order to qualify for the gifts had to remain in the service of the testatrix's husband from the time of the death of the testatrix to the date of death of the husband; and (2) that that condition had been fulfilled, since the marriage did not terminate the service agreement, and the relationship of husband and wife was not incompatible with that of master and servant.

Decision of Wynn-Parry J. affirmed.

APPEAL from Wynn-Parry J.

The following statement of facts is taken substantially from the judgment of Jenkins L.J. By her will, dated September 7, 1933, Augusta Kendrew (hereinafter called "the testatrix") made the following dispositions: Clause 3: "I bequeath free "of duty my freehold house known as Heatherstone and all my "furniture and household and personal effects in or about or "appropriated or belonging to the said dwelling-house at my "death unto my trustees upon trust for my said husband during "his life and from and after the death of my said husband I "bequeath free of duty my said dwelling-house and my said "furniture and household and personal effects to Mary Clark "the daughter of George Clark of Osmotherley for her own use "and benefit absolutely if she continues in the service of the "survivor of myself and my husband."

Clause 5 contained a general residuary devise and bequest followed by beneficial trusts of the net residue, in these terms: "Upon trust to pay the income thereof to my said husband "George Kendrew during his life and after his death upon trust "to realize my residuary trust fund in manner aforesaid and out "of the proceeds thereof (A) To purchase an annuity of one "hundred and four pounds a year which I give free of duty to "the said Mary Clark if still in the service of the survivor of "myself and my said husband at the time of his death in manner "hereinafter provided." There followed a trust for the payment of certain legacies, and a gift of the ultimate residue to other persons. Clause 7 contained an administrative provision as to buying an annuity of £104 for Mary Clark, on which nothing turned.

The testatrix died on December 3, 1938, being survived by her husband and by Mary Clark. The will was proved on January 17, 1939. About March, 1940, the testatrix's husband, George Kendrew, and Mary Clark, who had continued in his service as housekeeper since the death of the testatrix, were minded to get married, but they appreciated (presumably on advice) that if they got married without taking special measures, Mary Clark's service with George Kendrew might be determined so that she would be disqualified from receiving the gifts made to her by the will of the testatrix, inasmuch as those gifts depended upon her continuing in his service. To provide, so far as they could, against that result, they entered into an agreement under seal dated March 18, 1940, whereby, after a recital that "Mary Clark "was for many years in the service of the said George Kendrew "and his late wife Augusta Kendrew as housekeeper," and a recital further that "a marriage has been arranged and is "intended shortly to be solemnized between the said George "Kendrew and the said Mary Clark," it was agreed as follows: "(1) The said George Kendrew shall as from the date hereof "continue to employ the said Mary Clark as his housekeeper "and the said Mary Clark shall continue to serve the said George

" Kendrew as his housekeeper during the remainder of their joint " lives. (2) The said George Kendrew shall pay to the said Mary " Clark for her services as such housekeeper as aforesaid as from " the date of this agreement a salary of fifty-two pounds per " annum such salary to be paid quarterly on the eighteenth day " of March the eighteenth day of June the eighteenth day of " September and the eighteenth day of December in every year " and the first of such payments to be made on the eighteenth " day of June next. (3) This agreement shall continue in force " and the said Mary Clark shall continue in the service of the " said George Kendrew as his housekeeper hereunder in the event " of and after and notwithstanding the said intended marriage " of the said George Kendrew and the said Mary Clark."

That agreement having been duly signed, sealed and delivered, George Kendrew and Mary Clark married on March 26, 1940. Thereafter the household continued much as before. A salary of £52 a year was paid to the wife as agreed, and they lived together until the death of George Kendrew on December 27, 1951.

Wynn-Parry J. held that, notwithstanding the marriage of the housekeeper, Mary Clark, and the testatrix's husband, the housekeeper was in fact still in the service of George Kendrew at the time of his death and that, accordingly, she qualified for the gifts contained in the will of the testatrix.

The residuary legatees appealed.

Sir Lynn Ungoed-Thomas Q.C. and *F. E. Skone James* for the residuary legatees. On the true construction of the words used by the testatrix in her will and in the events which have happened the condition has not been fulfilled and the gift to Mary fails. The wording of the condition in clauses 3 and 5 differs slightly, clause 5 not being entirely clear, but I submit that both clauses were intended to stipulate that the housekeeper Mary must be still in the service of the survivor of the husband or the testatrix until the death of such survivor. Mary certainly satisfied the condition at the date of the death of the testatrix but her subsequent marriage has destroyed the relationship of employer and employee so that she is no longer " in the service of " the husband in the sense contemplated by the testatrix. The testatrix contemplated not merely a contract of service but a status. Whichever spouse survived, Mary was to remain in his or her service as a housekeeper, and the relationship was to be the same in either event. Though marriage was feasible as the testatrix predeceased her husband, she obviously could not have

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contemplated it as a possibility in either event. In the Oxford Dictionary "service" is connected with a status, a condition of master and servant.

[JENKINS L.J. If a wife is injured, her husband may bring an action for loss of her services. Is it not possible to double the functions of a paid housekeeper and a wife?]

It is possible to have the relationship of a master and servant between husband and wife, but the relevant test for construing this will is what must have been in the contemplation of the testatrix. One can only speculate as to what she would have wished in the events which have happened, but the words she has used impose the condition that Mary should be in the service of the survivor. In the language of ordinary people, such as this testatrix, there is a distinct and definite contrast between a wife and a servant, and though no doubt it is possible for the wife to contract as a feme sole with her husband, the testatrix is not likely to have contemplated that. She would have contemplated the continuation of the status of service and that is the relevant test; it is not in point to consider what a lawyer might have contemplated by the words she used.

As a matter of matrimonial law it has been said that in a normal home a wife is expected to perform certain duties of housekeeping, so that in so far as the wife performs these duties they are ascribable to her status as a wife, as being her normal duties and not the subject of a special contract. Counsel referred to *Thomas* v. *Thomas*[1] and *Wanbon* v. *Wanbon*.[2] If the contract of service had related to duties which were not those which she would be normally expected to perform as a wife it might have been effective but this wife had not contracted to do anything more than a normal wife would have done apart from the contract. After the marriage she could not be said to be performing the housekeeping duties as a servant and, consequently, the contract was not performed at all for what she did was not referable to the written document.

Charles Russell Q.C. and *B. G. Burnett-Hall* for Mary Kendrew. After the death of the testatrix the housekeeper remained in the service of the husband and she did not cease to be in his service by marrying the husband. A wife is admittedly competent to be in the service of her husband. In the present case she had contracted to be in his service; by the contract they were mutually bound, she to perform the services and he to pay for them. Reference to her status does not alter the fact that she was bound by her contract to remain in his service. When she married she did not cease to be in the relationship constituted by the contract, but she then acquired a dual relationship, as wife and as servant. It is therefore clear that the condition imposed by the will of the testatrix continued for the addition of something not named by the will, the superimposition of the status of husband and wife, cannot affect the performance of the condition which the testatrix selected as the one to lay down in her will. To say that she did not contemplate the event of her husband marrying the housekeeper does not assist the court to the construction put forward by the appellants. It is not permissible to guess what the testatrix had in mind for the purpose of construing her will; regard can be had only to the language she has used and to the circumstances in which she made the will. Even if it be assumed that the testatrix did not contemplate that the housekeeper might marry her husband, that means only that she did not think of the circumstances under which her will would have to be scrutinized; it does not alter the language she has used in the will. She has used perfectly clear words. "In the service of" means in the relationship created by a contract of service, and that is what has happened. It was conceded by the appellants that if the contract had related to duties other than those normally performed by a wife, the service contracted for might have continued after the marriage, and equally here it is submitted the marriage does not affect the service of the wife as a housekeeper in accordance with the contract. [He was stopped.]

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[1] [1948] 2 K.B. 294; 64 T.L.R. 377; [1948] 2 All E.R. 98.

[2] [1946] 2 All E.R. 366.

W. T. Elverston for the executor and trustee, the plaintiff.

JENKINS L.J. stated the facts and continued:—The gift in clause 3 to Mary Clark after the death of George Kendrew, of the freehold house, furniture and household and personal effects was subject to this condition: "if she continues in the service of the "survivor of myself and my husband." I am inclined to agree with Sir Lynn Ungoed-Thomas that the true construction of that provision is to require that Mary Clark should continue in the service of the survivor of the testatrix and her husband down to the death of such survivor. The point is, perhaps, open to doubt, and it is true that in clause 3 there is no such express reference to a continuance in the service down to the death of the husband as is to be found in clause 5. I think, on the whole, that the requirement of continuance in the service, in clause 3, is naturally construed as referring to continuance down to the death of the husband, inasmuch as that is the date on which the gift to Mary is to take effect if the condition is fulfilled. It is clear, too, that if the testatrix had in fact been the survivor, the service contemplated would be service continuing down to the date of her death. The other condition (which is in clause 5 and is in slightly different language) is also imperfectly expressed, being in these words: " if still in the service of the survivor of myself and my " said husband at the time of his death." The phrase " at the " time of his death " is not a happy expression in the context, inasmuch as the first part of the condition requires Mary to be still in the service of the survivor of the testatrix and her husband, and I think one may say that the testatrix meant by " at the " time of his death " at the time of the death of the survivor; but she was assuming (and it was quite a natural assumption for her to make for the purposes of this disposition) that her husband would survive her. Those are the two conditions and, as I have said, in effect I am prepared to construe them both as requiring Mary, in order to qualify for the gift, to continue, in the events which happened, in the service of the testatrix's husband from the time of the testatrix's death down to the date of her husband's death.

The question is whether the condition has been fulfilled. Sir Lynn Ungoed-Thomas and Mr. Skone James, for the appellant residuary legatees, have persuasively argued that the condition has not been fulfilled. They said that the testatrix had in mind simply the ordinary relationship of master and servant. They said that the marriage between George Kendrew and Mary Clark fundamentally altered her status, which ceased to be that of a housekeeper and became that of a wife. They said, further, that it could not possibly have been in the contemplation of the testatrix when she set about making a testamentary provision for an old servant of herself and her husband that the servant, for whose retirement she was providing, might become her husband's second wife and yet qualify for the same bounty. Mr. Skone James added an argument, which he found it necessary to buttress by authority, to the effect that in our matrimonial courts it is recognized that one of the functions of a wife is to perform the ordinary household duties in the home. He said that therefore, when Mary became the wife of George Kendrew, there ceased to be any duties to which the service agreement could relate, inasmuch as she was bound to perform like duties without remuneration in her new status as the wife of George Kendrew. Apart from other differences in the two relationships, that argument seems to me to overlook the fact that Mary's employment subsequent to the service agreement of March 18, 1940, was employment under an agreement under seal. This could not, therefore, be said to be one of those cases where there was an agreement amounting to no more than nudum pactum because one party was merely undertaking to perform that which she was already bound to perform.

A further argument presented for the residuary legatees was to the effect that a servant was one thing and a wife was another when it came to making provision for them. It was pointed out that the position of Mary, on the assumption that she did not marry George Kendrew, but simply remained in his service until his death, would be very different from that which it would be on the footing that she married him and on his death became his widow. In the latter event she would have all the expectations of a widow under his will or intestacy. In the former case she would have no similar claim on his bounty, and would have to rely, by way of provision for her retirement, on what, if anything, either the testatrix or George Kendrew chose to give her in recognition of her past services. That consideration was relied on as lending further support to the view that the testatrix could not have intended to include as continuance "in the service of" her husband within the meaning of the condition the event of Mary marrying her husband. It was also pointed out that George Kendrew had quite substantial assets of his own out of which he could have made provision for a second wife if so minded.

I am far from saying that these arguments are without force; but what the court has to do is to construe these conditions according to the proper meaning of the language used and to see whether or not, as a matter of law, they have been fulfilled in the events which have happened. It is not disputed on the part of the appellants that it is possible in law for a husband to enter into an agreement with his wife in the nature of a contract of service. In other words, it is not disputed that the two relationships of husband and wife and of master and servant are not, as a matter of law, incompatible. From and immediately after the death of the testatrix, Mary was undoubtedly in the service of the husband, George Kendrew, and it is not in dispute that she continued in such service down to the time when the service agreement was entered into, and thereafter down to the time when she married George Kendrew. Inasmuch as the service agreement continued in force for the rest of the life of George Kendrew, Mary, as appears from the evidence, having been regularly paid the quarterly sum of £13, making £52 a year as stipulated in the agreement, with the immaterial exception that for some few quarters a larger sum was inadvertently paid, it appears to me to follow that she remained in George Kendrew's service down to the date of his death. If it cannot be said, as a matter of law, that the marriage put an end to the service agreement, there seems to me to be no escape from the conclusion that the relationship of master and servant continued down to that date. And although it may well be that the testatrix never contemplated the possibility of Mary doubling the role (if I may use that expression) of housekeeper under an agreement under seal with that of wife, nevertheless the condition she actually imposed was no more than that Mary Clark should continue in the service of the husband for the rest of his life. That condition, for the reasons which I have indicated, seems to me to have been fulfilled; and if the relationship of master and servant did continue so that the condition was literally fulfilled according to its terms, I cannot see how it can be successfully contended that the effect of the continuance of that relationship as a sufficient fulfilment of the condition was destroyed on account of the additional relationship of husband and wife which supervened upon the existing relationship of master and servant.

There is no doubt an air of artificiality in the measures taken by George Kendrew and Mary Clark for the purpose of fulfilling the condition, but that is not necessarily any ground for holding that the measures which they took did not attain the object in view. They wished to marry without producing the result that Mary ceased to fulfil the condition of continuing in George Kendrew's service. To achieve that end they adopted the expedient of entering into this service agreement under seal, and in my judgment, the agreement was effective to produce the desired result.

For these reasons I am of opinion that in this curious, and not altogether easy, case Wynn-Parry J. came to a right conclusion, and this appeal fails and should be dismissed.

MORRIS L.J. I am of the same opinion. When the testatrix made her will in 1933 Mary Clark was then employed as a housekeeper. She had been a housekeeper since the previous year, and for many years before that she had been a companion-help. She continued thereafter to act as housekeeper until the death of the testatrix in December, 1938. The testatrix was survived by her husband, Mr. Kendrew. Mary Clark undoubtedly continued to be in the service of the survivor, Mr. Kendrew, until March, 1940. She then married him. We have been told that Mr. Kendrew was in possession of a substantial income. At the time of the marriage Mary Clark might have adopted the attitude that, just as Mr. Kendrew and the first Mrs. Kendrew had a housekeeper so, if she was to become the second Mrs. Kendrew, a new housekeeper should be employed. She did not adopt that attitude but she agreed to continue as housekeeper and she entered into a binding contract with Mr. Kendrew that she would continue as his housekeeper during their joint lives. In my judgment, therefore, she qualifies within the language of both clause 3 and clause 5 of the will in that she continued to be in the service of Mr. Kendrew until he died.

VAISEY J. I am of the same opinion, and for the same reasons. I think that Wynn-Parry J. came to a right conclusion and that this appeal must fail.

Appeal dismissed.

Solicitors: *Wilberforce Allen & Bryant, for Tempest, Watson & Croysdale, Leeds; Bell, Brodrick & Gray, for Hunt & Wrigley, Northallerton; Jaques & Co., for E. J. Place & Blair, Northallerton.*

E. D.

STEVENS *v.* HUTCHINSON AND ANOTHER.

[1952 S. No. 1246.]

Feb. 24, 25
Upjohn J.

Trust for Sale—Judgment creditor—Property held by debtor and wife on trust for sale as tenants in common—Receiver appointed—Creditor not entitled to order for sale—Not "person interested"—Not equitable chargee of proceeds of sale—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 30, 195, 205 (1) (x)—*Land Charges Act,* 1925 (15 *Geo.* 5, *c.* 22), *ss.* 6, 20.

A judgment creditor was appointed as receiver by way of equitable execution of the debtor's interest in a house, which was held by the debtor and his wife on trust for sale as tenants in common. The creditor asked the court for an order for sale under section 30 of the Law of Property Act, 1925, as being a "person "interested" within the meaning of that section, either as being an equitable chargee under section 195 of that Act, or alternatively by virtue of his position as receiver.

The evidence was that this was the matrimonial home, and that the debtor was a spendthrift, who had been repeatedly lent money by his wife:—

Held, (1) that the judgment creditor was not, by virtue simply of his position as receiver, a "person interested" within the meaning of section 30, which meant a person interested in some proprietary right under the trust.

(2) That the appointment of a receiver did not give the creditor a charge under section 195 of the Act on the proceeds of sale of the property; such a charge was confined to equitable interests in land, and did not extend to equitable interests in the proceeds of sale of land.

(3) That if the creditor had had any locus standi to ask for an order under section 30, it would not have been right, in the circumstances of this case, to make such an order.

Ideal Bedding Co. Ld. v. *Holland* [1907] 2 Ch. 157; 23 T.L.R. 467 considered.

ADJOURNED SUMMONS.

The plaintiff was a judgment creditor of the first defendant, against whom he obtained judgment in the King's Bench Division on January 2, 1951, in the sum of £2,008 17s. 3d. with £9 16s. 0d. costs. On January 3, 1951, the plaintiff sued out a writ of fieri facias under which he recovered £189 11s. 0d. and no more.

On January 25, 1951, the plaintiff obtained an order for the appointment of himself as receiver by way of equitable execution of the first defendant's interest in a property known as 39 Carr Lane, York. The plaintiff registered the action as a pending action under the Land Charges Act, 1925, on January 26, 1951, and the order of January 25, 1951, as a writ or order affecting land on February 16, 1951.

Trust for sale

The property was devised to the first defendant and his wife, the second defendant, in equal shares as tenants in common, under the will of the first defendant's father. The will was dated May 18, 1944; the father died on December 15, 1945. The property was vested by the defendants in themselves by a vesting assent dated September 4, 1946, for "an estate in fee "simple upon trust to sell the same with power to postpone the "sale thereof and to hold the net proceeds of sale and the net "income till sale in trust for ourselves [the defendants] as "tenants in common in equal shares."

The evidence of the second defendant was that the first defendant had been a complete spendthrift throughout the marriage, and that she had repeatedly lent him money. The first defendant's father had made this bequest of No. 39 Carr Lane to provide a matrimonial home for the defendants. There were three children of the marriage, now grown up. The second defendant had very little means besides this house where she lived, and where the first defendant lived from time to time.

The plaintiff by this summons asked for an order under section 30[1] of the Law of Property Act, 1925, directing the defendants to sell No. 39 Carr Lane with vacant possession.

K. J. T. Elphinstone for the plaintiff. The plaintiff by the appointment of a receiver is a "person interested" within the meaning of section 30. The appointment of a receiver by a judgment creditor under the Bankruptcy Act, 1914, does not of course make him a secured creditor: see *In re Potts*.[2] But the appointment of a receiver by way of equitable execution of a debtor's reversionary interest operates as an injunction to restrain a debtor, and, it is submitted, also third persons, from receiving the income of the property: see *Ideal Bedding Co. Ld.* v. *Holland*.[3] That case shows that apart from any charging order, a judgment creditor is a person interested, and as such he must be entitled to an order under section 30.

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[1] Law of Property Act, 1925, s. 30: "If the trustees for sale refuse "to sell or to exercise any of the "powers conferred by either of the "last two sections, or any requisite "consent cannot be obtained, any "person interested may apply to the "court for a vesting or other order "for giving effect to the proposed "transaction or for an order directing "the trustees for sale to give effect "thereto, and the court may make "such order as it thinks fit."

S. 195: "(1) . . . a judgment "entered up in the Supreme Court ". . . against any person . . . shall "operate as an equitable charge "upon every estate or interest "(whether legal or equitable) in all "land to or over which the judgment "debtor . . . is or becomes—(*a*) beneficially entitled; or (*b*) entitled to "exercise a power of disposition for "his own benefit without the assent "of any other person. . . . (2) Every "judgment creditor shall have the "same remedies against the . . . "interest in the land so charged . . . "as he would have been entitled to "if the judgment debtor had power "to charge the same, and had by "writing . . . agreed to charge the "same, with the amount of the judgment debt and interest thereon. "(3) Provided that—(i) a judgment ". . . shall not operate as a charge "on any interest in land . . . unless ". . . a writ or order, for the purpose of enforcing it, is registered "in the register of writs and orders "at the Land Registry. . . ."

S. 205 (1) (x): "'Legal estates' "mean the estate, interest and "charges in or over land . . . which "are by this Act authorized to "subsist or to be created as legal "estates; 'equitable interests' mean "all the other interests and charges "in or over land or in the proceeds "of sale thereof. . . ."

[2] [1893] 1 Q.B. 648; 9 T.L.R. 222, 308.

[3] [1907] 2 Ch. 157; 23 T.L.R. 467.

In any event it is submitted that a judgment creditor, having the benefit of an order appointing him receiver of an interest in the proceeds of sale of land, is entitled to a charge on the interest under section 195 of the Law of Property Act, 1925. If that be so, the plaintiff is a person "interested" under section 30 as a person having a charge. The first defendant's interest is an equitable interest in land because it is an interest in the proceeds of a trust for sale of land. Reliance for that argument is placed on the definitions in section 205 (1) (x) of the Law of Property Act. The definition of land does not include the purchaser's interest as it excludes an undivided share in land, but an equitable interest in land includes an interest in the proceeds of a trust for sale of land: see Wolstenholme & Cherry's Conveyancing Statutes, 12th ed., Vol. 1, p. 566, and *In re Warren.*[4]

Under section 13 of the Judgments Act, 1838, in which the words are similar to section 195, a creditor did not have a charge of this nature (see *Thomas* v. *Cross*[5]), but the definition of equitable interest in para. (x) of section 205 (1) makes the position different now.

The defendants in their position as trustees for sale are bound to consider the interest of the plaintiff as a beneficiary under the trust for sale.

The plaintiff is entitled to have his own merits considered. It is not now only a question of the merits of the husband, but also those of the plaintiff, who has done nothing which should disentitle him from his rights. Assuming that the plaintiff is a person interested he has an undoubted right to apply to the court, and that mere fact gives the court jurisdiction.

The primary trust here is not to keep the trust property intact, but to sell, and until sale apply the net profits for the beneficiaries. As long as the husband and wife are the only persons interested, there is no duty to sell or let the property; but when a third party, the plaintiff, appears, who also is beneficially interested, and who can say that not selling does not give effect to his interest, then it is the duty of the defendants, as trustees, having regard to the plaintiff's interest, to sell the property: see *Tempest* v. *Lord Camoys.*[6]

The first defendant was not represented and did not appear.

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[4] [1932] 1 Ch. 42, 46.

[5] (1865) 2 Dr. & Sm. 423.

[6] (1882) 21 Ch.D. 571.

M. J. Albery for the second defendant. The defendant's case can be put in three ways: (1) It is claimed that the applicant has no interest under section 30, and, therefore, no locus standi; (2) it is not the practice of the court to interfere with bona fide exercise of a discretion by trustees; (3) if the merits are examined the merits are with the defendant.

Section 195 of the Law of Property Act cannot be construed to refer to proceeds of sale of land by reference to the definition of equitable interest in section 205 (1) (x), because in section 195 there are included the qualifying words "in land," which do not occur in section 205 (1) (x), and are wrongly inserted in the note in Wolstenholme & Cherry's Conveyancing Statutes, 12th ed., Vol. 1, p. 566.

Section 6 of the Land Charges Act, 1925, provides for the registration of writs against land, but not against the proceeds of sale of land. This is in conformity with the policy of the Act, which is to protect purchasers of land and not purchasers of proceeds of sale.

No charge under section 195 is created, therefore, by the appointment of a receiver of the proceeds of sale. The same meaning should be given to section 195 as in section 13 of the Judgments Act, 1838, which in effect is replaced by section 195.

If it is conceded that a receiver of the proceeds of sale has no charge under section 195 of the Law of Property Act, 1925, then he has no interest under section 30 of the Act. The word "interested" in the section must be subject to some qualification; the proper line to draw is to say that it denotes a person who has a proprietary interest under the trust, for instance, mortgagees. A mere commercial interest, such as a prospective purchaser or an ordinary creditor, is not within the definition. Although a person who has appointed a receiver by way of equitable execution has gone one step further, he has not a proprietary interest and cannot apply under the section. The object of the section is to allow beneficiaries under a trust to apply to the court, not to assist their creditors.

In the absence of mala fides by trustees, the court will not, as a matter of practice, interfere with them in the exercise of their discretion: see *In re Brockbank.*[7] So long as the power to postpone a sale continues there is no reason why the trustee should be forced to sell: *In re Kipping.*[8] Section 30 does not of

[7] [1948] Ch. 206; [1948] 1 All E.R. 287.

[8] [1914] 1 Ch. 62.

itself confer any fresh power in the court to sell; it is merely machinery.

Section 26 (3) of the Act relates to substantive rights, but it is excluded because the trust for sale here is not a statutory trust.

With regard to the merits, if this were an application by the husband instead of an application by his creditor it would be refused. The plaintiff cannot put himself in a better position than the husband. The position of a deserted wife who is left in the matrimonial home has been considered and recognized by the courts: see *Bendall* v. *McWhirter*.[9] In the circumstances it would be wrong to turn the wife out of her home by ordering a sale.

Elphinstone replied.

UPJOHN J., having stated the facts, continued:—The plaintiff claims to be entitled to an order for sale of the property, which is, at any rate, in the occupation of the second defendant, and, it appears from the evidence, from time to time of her husband, the first defendant. The plaintiff's claim is that he is a "person "interested" under section 30 of the Law of Property Act, 1925. He puts his case in two ways: first, he argued that the appointment of the plaintiff as receiver by the order of January 25, 1951, although admittedly not creating a charge upon the property, made the plaintiff a "person interested" for the purposes of section 30, and gave him, therefore, a title to come before the court.

The position of a receiver appointed by way of equitable execution is well set out in *Ideal Bedding Co. Ld.* v. *Holland*,[1] in which Kekewich J. said[2]: "It was established in *Flegg* v. "*Prentis*[3] that no declaration of charge can be made on a judgment debtor's reversionary personalty in favour of a judgment "creditor who has obtained such an appointment,"—that is, the appointment of a receiver by way of equitable execution—"and "it follows that the judgment creditor has no right to have his "debt raised by sale or mortgage of that subjected to the receiver. "And it was decided in *In re Potts*[4] that the order appointing a "receiver does not make the judgment creditor a secured creditor "within the meaning of the Bankruptcy Act, 1883. What then "is the utility of such appointment indicated by Lindley L.J. in

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[9] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[1] [1907] 2 Ch. 157.

[2] Ibid. 169.

[3] [1892] 2 Ch. 428.

[4] [1893] 1 Q.B. 648.

"*Tyrrell* v. *Painton*[5]? The Lord Justice, to some extent, answers the question himself. He says: 'The appointment of a receiver does not create a charge, but it operates as an ✓ injunction to restrain the defendant from himself receiving the proceeds of sale.' And in *In re Marquis of Anglesey*[6] Swinfen Eady J. explains, by reference to *Levasseur* v. *Mason & Barry Ld.*,[7] the advantage of obtaining such an order. The same learned judge in the same case, in a passage immediately preceding that to which I have just referred, says: 'In my opinion it prevents the debtor from dealing with the moneys to the prejudice of the judgment creditor; and it also prevents any subsequent judgment creditor from gaining priority over the creditor obtaining the order, if at the date when obtained the property of the judgment debtor cannot be taken in execution or made available by any other legal process.' It was urged in argument that this statement by Swinfen Eady J. that the appointment of a receiver prevents the debtor from dealing with the moneys to the prejudice of the judgment creditor goes beyond, and indeed contravenes, other judicial expressions on the same point. That may be so, but I venture to think that this statement of the law will eventually prove to be sound. I do not myself see how the Court, after restraining the defendant from himself receiving the property, can stop short of granting whatever injunction is necessary to prevent its being received by others."

The effect, then, of the appointment of a receiver is that it does not create a charge on the property, but that it operates as an injunction against the judgment debtor receiving the income; and it may, although that appears to be a matter of some doubt, also give the right to the judgment creditor to obtain an injunction against third parties receiving that income. Nevertheless, such an appointment confers upon the judgment creditor purely personal rights against the judgment debtor and gives the former no right over the property as such. A receiver so appointed is not, in my judgment, a person interested for the purposes of section 30; "a person interested" there means, in my view, a person interested in some proprietary right under the trust for sale, whether as a beneficiary or assignee or chargee, and does not include a person who may have some personal rights—such as a judgment creditor who has appointed a receiver.

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[5] [1895] 1 Q.B. 202, 206.

[6] [1903] 2 Ch. 727, 731; 19 T.L.R. 719.

[7] [1891] 2 Q.B. 73; 7 T.L.R. 114, 436.

Secondly, the plaintiff contends that he has a charge upon the property under section 195 of the Law of Property Act, 1925. Before examining that section it may be useful to say that it had been decided in *Thomas* v. *Cross*[8] that the charge created by section 13 of the Judgments Act, 1838, did not include a charge upon the proceeds of sale of land where the interest of the judgment creditor was solely in such proceeds. Section 195 substantially re-enacted section 13, although in rather different words.

It was conceded that, apart from the definition clause to which I must refer, an interest in the proceeds of sale is not aptly described as an equitable interest in land, but it was said that the effect of section 205, the definition section of the Law of Property Act, is to include an interest in the proceeds of sale in the definition of an equitable interest in land. [His Lordship read sub-paragraph (x) of subsection (1) of section 205.] When that definition section is examined it is seen that it does not operate so as to make an equitable interest in land include an equitable interest in the proceeds of sale. The definition is not of "equitable interests in land" but of "equitable interests," and I can see nothing in sub-paragraph (x) which makes an equitable interest in land include an interest in the proceeds of sale of land; the definition refers to equitable interests generally; the words in subsection (1) of section 195 refer only to equitable interests in land. Accordingly, in my judgment, section 195 does not create a charge upon the proceeds of sale of land.

That view is supported by an examination of the Land Charges Act, 1925. It will be recalled that, under subsection (3) (i) of section 195 of the Law of Property Act, before the charge operates a writ or order must be registered in the register of writs and orders at the Land Registry. Examination of Part III of the Land Charges Act makes it clear that sections 6 and 7 are only appropriate to the registration of writs and orders affecting land, and not the proceeds of sale of land. Section 6 provides: "There "may be registered in the register of writs and orders—(*a*) any "writ or order affecting land . . . (*b*) any order appointing a "receiver or sequestrator of land; (*c*) any receiving order in "bankruptcy made after the commencement of this Act, whether "or not it is known to affect land." In section 20 (6) of the Land Charges Act, "land" is defined in a way which does not include the proceeds of sale of land. The legislature appears to have contemplated that the only writs and orders to be registered are those affecting land and not the proceeds of sale of land—and that for the obvious reason that the whole object of the Land Charges Act was to protect purchasers of land, who are not concerned with the application by the vendor of proceeds of sale of land. Accordingly, in my judgment, section 195 does not create a charge upon the proceeds of sale of land in this case. Hence, the plaintiff's case here fails in limine.

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[8] 2 Dr. & Sm. 423.

I should, however, add this: that, even if the plaintiff established that he had an interest in the land, I can see no reason why, in the circumstances of this case, he should obtain an order for the sale of the land. I do not propose to refer in any way to the evidence, but this much is clear: that both the plaintiff and the second defendant have suffered from the first defendant, the husband, who has treated the plaintiff very badly and who appears to have treated his wife extremely badly for many years. He is a ne'er-do-well and a waster, but this is the matrimonial home and the wife who is in equity owner of half the house is living there. Her husband appears to live there occasionally, though at the present time he is not. The receiver can have no higher rights than the husband and I can see no ground on which it would be right or proper for the court to order a sale of the property in order that the judgment creditor may be satisfied.

No doubt one day a sale will take place and the plaintiff as receiver will receive the husband's share of the proceeds of sale. However, as, in my judgment, the plaintiff does not establish his case at law, I need say no more about that.

I shall dismiss this application, and I do so with costs.

Application dismissed.

Solicitors: *Field, Roscoe & Co., for A. Cotterell & Co., Walsall; Arnold Carter & Co., for H. Gillings & Walker, York.*

I. G. R. M.

C. A.

1953
Feb. 4, 5.

Evershed M.R., Jenkins and Morris L.JJ.

In re JOHN SMITH'S TADCASTER BREWERY CO. LD. JOHN SMITH'S TADCASTER BREWERY CO. LD. *v.* GRESHAM LIFE ASSURANCE SOCIETY AND ANOTHER.

[1952 J. No. 3307.]

Company—Proposed increase of capital—Creation of ordinary shares—Distribution to ordinary shareholders—Whether preference shareholder's rights "affected"—Construction of articles of association.

A company was proposing to increase its capital by creating 280,000 ordinary shares of £1 each. The shares were to be issued to the ordinary shareholders and credited (in accordance with power conferred by article 115 of the articles of association) as fully paid up from the undistributed profits of the company. By article 48 of the company's articles of association the company had power in general meeting to increase its capital, but by article 69 the holders of preference stock were only entitled to attend a general meeting of the company if the preference dividend was in arrears or unpaid, or if a resolution was to be proposed for the sale of the undertaking or winding up of the company, or for the reduction of the capital of the company "so as directly "to interfere with or affect the rights and privileges of the said "holders." Article 54 provided, subject to the limitations imposed by section 61 of the Companies Act, 1929 [now contained in section 72 of the Companies Act, 1948]: "all or any of the rights or privileges "attached to any class of shares . . . may be affected, modified, dealt "with or abrogated in any manner with the sanction of an extra-"ordinary resolution passed at a separate meeting of the members "of that class. . . ."

The company asked whether the proposed increase of capital could be made pursuant to a resolution in general meeting or whether the increase must be sanctioned by an extraordinary resolution passed at a separate meeting of the holders of preference stock held in accordance with article 54. On appeal from Danckwerts J., who held that such a resolution was needed:—

Held, that the voting rights of the preference stockholders as members of the company would not be "affected" within the meaning of article 54 by the proposed new issue of capital merely because a greater number of people would have similar voting rights; that none of their rights or privileges would therefore be "affected," and that the increase need not therefore be sanctioned by them.

White v. *Bristol Aeroplane Co. Ld.*, ante, 65; [1953] 2 W.L.R. 144; [1953] 1 All E.R. 40 followed.

Decision of Danckwerts J. [1952] W.N. 501; [1952] 2 T.L.R. 853; [1952] 2 All E.R. 751 reversed.

APPEAL from Danckwerts J.

The company, John Smith's Tadcaster Brewery Co. Ld., was incorporated on August 8, 1892, and preference shares were issued in 1895. Pursuant to special resolutions passed at an extraordinary general meeting of the company on July 23, 1943, and by virtue of a scheme of arrangement between the company and the holders of preference and ordinary shares, which was sanctioned by an order dated November 22, 1943, inter alia, all the preference shares were converted into stock. The scheme also provided that new articles of association should be adopted, and that was done on July 23, 1943. The relevant provisions of these articles are all set out in the judgment of Evershed M.R.

In 1952 the issued paid-up capital of the company consisted of £1,740,000 five per cent. cumulative preference stock and 1,920,000 ordinary shares of £1 each. The company proposed to increase the capital of the company by distributing £280,000 surplus profits in paying up in full 280,000 new ordinary shares of £1 each, which were to be issued to the then existing ordinary shareholders.

Doubts arose as to whether, inter alia, the creation and issue of the further ordinary shares affected the rights of the preference stockholders and necessitated their consent in accordance with the articles of association of the company. Accordingly, a summons was taken out dated June 20, 1952, the defendants being one holder of preference stock and one ordinary shareholder. The summons came before Danckwerts J., and on October 9, 1952,[1] he held that the company could in general meeting increase its capital by the creation of the new ordinary shares as proposed, but that the sanction of an extraordinary resolution passed at a separate meeting of the preference stockholders was necessary. and he declared accordingly.

The ordinary shareholder appealed.

M. Gedge Q.C. and *M. M. Wheeler* for the ordinary shareholder, the second defendant. This case is covered by *White* v. *Bristol Aeroplane Co. Ld.*[2] The rights of the preference shareholders are not so affected by the proposed issue of shares to ordinary shareholders as to entitle them to be summoned to a separate meeting. There are differences between the articles of Bristol Aeroplane Co. Ld. and those under consideration, but the differences do not suffice to distinguish the two cases; and here, as in *White* v. *Bristol Aeroplane Co. Ld.*,[2] the preference shareholders' legal rights will be exactly the same after the issue as before, though the practical effect of exercising their right of voting will be diminished because the number of ordinary shareholders has been increased. There is, however, nothing in the articles which entitles the preference shareholders to insist on a fixed proportion being maintained between the numbers of preference shareholders and the ordinary shareholders, and in the legal sense their rights are not affected by what is proposed.

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[1] [1952] 2 All E.R. 751.

[2] Ante 65.

R. Jennings Q.C. and *R. H. Walton* for the first defendant, the preference shareholder. This case is distinguishable from *White* v. *Bristol Aeroplane Co. Ld.*[2] because of the differences between the articles of the two companies. [Counsel contrasted article 54 of the Brewery Company articles with article 68 of the Bristol Aeroplane Co. Ld.] In article 68 of the latter company, instead of providing, as in the present case, that the rights or privileges of shareholders may be "affected, modified, dealt with "or abrogated in any manner," the words used are "modified, "varied, dealt with or abrogated in any manner." In *White* v. *Bristol Aeroplane Co. Ld.*[2] it was not argued that the words used were each intended to carry a distinct individual meaning, for "modified" could not reasonably be distinguished from "varied." Consequently, the phrase had there to be construed at large on a consideration of the other articles and with particular reference to a provision at the end of article 62 (which is not included in the corresponding article 48 of the articles of the Brewery Company). In the present case the omission of "varied" in article 54 leaves each word with a distinct meaning. "Affected," I submit, includes the alteration in the value of the rights relative to that of others, "modify" means "vary," "abrogate" means "take away" and "dealt with" covers such operations as the conversion of preference shares to stock.

[JENKINS L.J. Might not the phrase be construed exegetically as "affected, whether by modification, abrogation or a dealing "with" the rights?]

Although I submit that "affect" should be construed in a business sense, bearing in mind that this is a commercial document, I do not suggest that every activity that affects the relative values of any type of shares requires the prior sanction of the other types of shareholders. For example, the payment of a dividend to the ordinary shareholders would affect the relative values of the shares but it would not affect the security of the preference shareholders and would not need to be sanctioned by them. In *White* v. *Bristol Aeroplane Co. Ld.*[2] it was said that

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[2] Ante 65.

"affected" could not be construed in the business sense so as to include anything other than the legal rights of the shareholders but the phrase used in those articles was tautologous and the words were not, as here, capable of taking a sensibly distinct meaning.

[JENKINS L.J. If for some reason the number of adults capable of voting in a general election was to be suddenly increased, or found to have been increased, could any individual voter show that his voting rights had been "affected" though undoubtedly the weight attached to his vote would be reduced?]

[EVERSHED M.R. If "affect" means affect in relation to the value of other shares, article 115 of the articles of the Brewery Company which deals with capitalization of reserves should have made it clear that the prior sanction of preference shareholders would be needed.]

The articles must be read as a whole and, in construing article 115, that which has already been said in article 54 is implicit without further statement.

In article 69 the draftsman added after the words "altering "the regulations of the company so as directly to interfere with" the words "or affect" . . . the rights and privileges; that addition was made after the conversion scheme of 1943.

K. W. MacKinnon for the plaintiff company.

EVERSHED M.R. The question raised in this appeal is obviously very similar to that which was decided by this court in *White* v. *Bristol Aeroplane Co. Ld.*[1] namely, whether a proposed distribution of surplus profits among the ordinary stockholders in accordance with a regulation of the company for capitalization affects the rights or privileges of the preference stockholders. The relevant regulations of the company are not in all respects the same as those in *White* v. *Bristol Aeroplane Co. Ld.*[1] and, naturally enough, Mr. Jennings, for the preference stockholders, has relied on the difference as showing that the result in this case should not follow or be treated as governed by *White* v. *Bristol Aeroplane Co. Ld.*[1]

[His Lordship referred to the facts and continued:] The result of the proposed transaction will be to swell the amount of the issued ordinary shares and to give the holders of those shares added force in any matter which the holders of the two classes of stocks or shares are together considering.

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[1] Ante 65.

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The present articles, as Mr. Jennings pointed out, were adopted in 1943, at the time of the scheme of arrangement between the company and the holders of its preference and ordinary shares; and, indeed, the form of one, at any rate, of the articles reflects in some measure one of the provisions of that scheme of arrangement. But though in some respects, as I have said, these articles differ from the corresponding articles in *White* v. *Bristol Aeroplane Co. Ld.*,[1] they are alike in that they display a verbosity which has given rise to the present difficulty. Mr. Jennings has urged that these articles must be construed as a commercial document in a business sense. I confess that I am not sure what inference should be drawn from that submission. I rather doubt, however, whether the regulations of the company (which were probably prepared by professional men) can be properly described as a "commercial" document for the purposes of the argument put forward; and, as I said in *White* v. *Bristol Aeroplane Co. Ld.*,[1] it is perhaps unfortunate that those responsible for drafting these regulations seemed apt (and there are several examples in this case) to string together words without pausing to reflect what their joint or separate significance might be.

Article 47 contains a statement of certain of the special privileges attached to the preference stockholders: "The following "provisions shall have effect:—(A) The holders of the preference "stock in the capital of the company shall have the right to "receive a fixed cumulative preferential dividend at the rate of "five per cent. per annum on the amount of stock held by them "respectively in priority to the holders of any other class of stock "or shares of the company. (B) The preference stock shall in a "winding up of the company rank for repayment of capital, "together with all arrears of the fixed preferential dividend there-"on, whether declared or earned or not, up to the commencement "of the winding up in priority to all other stock or shares in the "capital of the company. (C) The holders of the ordinary shares "in the capital of the company shall be entitled between them to "the surplus profits of the company which it shall from time to "time be determined to distribute by way of dividend and in a "winding up shall rank for repayment of capital after payment "off of the capital and arrears of dividend represented by the said "preference stock. (D) The right of the holders of the prefer-"ence stock to receive notice of or attend or vote at general

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[1] Ante 65.

"meetings of the company shall be restricted in manner hereinafter mentioned."

Those provisions, together with the subsequent provisions as to the modification of rights and the expanded reference to votes, contain a statement of the particular privileges or rights of the preference stockholders. A matter which came before Danckwerts J. was whether the rights given under paragraph (C) of article 47 to the holders of the ordinary shares in the capital of the company on a winding up were such as to exclude the preference stockholders from participating in those surplus assets after they (the preference stockholders) had received repayment of capital and any unpaid dividend in priority to the ordinary shareholders. Danckwerts J. decided that the preference stockholders had no right of further participation in a winding up. There has been no appeal against that decision and it is unnecessary, therefore, and, indeed, not right, that I should say anything further about it.

Article 48 provides for "Increase of Capital": "The company may from time to time, in general meeting, whether all the shares for the time being authorized shall have been issued, or all the shares for the time being issued shall have been fully called up or not, increase its capital by the creation of new shares, such aggregate increase to be of such amount and to be divided into shares of such respective amounts as the general meeting resolving upon the creation thereof shall direct. Subject and without prejudice to any rights for the time being attached to the shares of any special class, any shares in such increased capital may have attached thereto such special rights or privileges as the general meeting resolving upon the creation thereof shall direct, or, failing such direction, as the directors shall by resolution determine, and in particular any such shares may be issued with a preferential, deferred or qualified right to dividends or in the distribution of assets and with a special or without any right of voting. With the sanction of a special resolution, any preference share may be issued on the terms that it is or at the option of the company is liable to be redeemed."

That article corresponds with article 62 of the regulations of the Bristol Aeroplane Co. Ld., which, on a matter of construction, was treated by this court as of some significance in *White* v. *Bristol Aeroplane Co. Ld.*[1] But in that case there was an added provision as regards the right to issue new preference shares or stock which does not find any place in this article. In my judgment in *White* v. *Bristol Aeroplane Co. Ld.*[1] I said that what I called the second part of article 62 of the articles of Bristol Aeroplane Co. Ld. was not present in the articles of John Smith's Tadcaster Brewery Co. Ld.; that is inaccurate, it does form the second part of this corresponding article, No. 48.

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[1] Ante 65.

Article 50 in the present case provides: " Subject to any directions that may be given in accordance with the powers contained " in the memorandum of association or these articles, any capital " raised by the creation of new shares shall be considered as part of " the original capital, and shall be subject to the same provisions " with reference to the payment of calls, transfer, transmission, " forfeiture, lien and otherwise as if it had been part of the original " capital." That differs from the corresponding article of the Bristol Aeroplane Co. Ld., [64] which provides to the effect that, in the absence of any special determination as to the character of the new shares, they shall be treated as though they were ordinary shares.

Article 54 in the present case is the " Modification of Rights " clause, and, as a matter of construction, it is substantially the same as the corresponding article of the Bristol Aeroplane Co. Ld. [68]: " Subject to the provisions of section 61 of the Act " (now section 72 of the Companies Act, 1948) " all or any of the rights " or privileges attached to any class of shares forming part of the " capital for the time being of the company may be affected, " modified, dealt with or abrogated in any manner with the " sanction of an extraordinary resolution passed at a separate " meeting of the members of that class. To any such separate " meeting all the provisions of these articles as to general " meetings shall mutatis mutandis apply, but so that the " necessary quorum shall be "—as therein provided. The only material difference is, I think, that the draftsman of this article did not include the word " varied," as his colleague had in the articles of the Bristol Aeroplane Co. Ld.

Article 69 is entitled: " Votes of Members," and is as follows: " Subject to any special rights, restrictions or prohibitions as " regards voting for the time being attached to any special class " of shares in the capital of the company, on a show of hands " every member personally present shall have one vote only, and " in case of a poll every member shall (subject as hereinafter

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[1] Ante 65.

"provided) have one vote for every share held by him"; and what was "hereinafter provided" is. "The holders "of the preference stock shall not as such be entitled to "receive notice of or to attend or vote at any general meeting "of the company unless (A) the fixed cumulative preferential "dividend on the preference stock is in arrears or unpaid for "six months prior to the date of the meeting; or (B) a resolution "is proposed to be passed at such meeting for the sale of the "company's undertaking, or for the winding up or reduction of "the capital of the company, or for altering the regulations of the "company so as directly to interfere with or affect the rights and "privileges of the said holders. . . ."

As a matter of language, that article differs to an appreciable extent from the corresponding article of the Bristol Aeroplane Co. Ld., [83] but for present purposes the difference is not material. For one thing, in the present case we are not concerned to decide whether the preference stockholders are entitled to be summoned to a general meeting. I observe, however, that, as a matter of drafting, it is a curious feature of the article that, if the rights and privileges of the stockholders are to be directly interfered with or affected otherwise than by, or as part of, an alteration of the regulations, and the case is not one for winding up or reduction of capital or a sale of the company's undertaking, it would appear that the preference stockholders are not, at any rate by the express terms of this article, entitled to be summoned to the meeting. But it is that passage, "so as directly to "interfere with or affect," which is in some measure a reflection of the terms of the scheme of arrangement of 1943; though, as Mr. Jennings has pointed out, this draftsman (who had, apparently, a liking for this word "affected") inserted in the article, after the words "directly to interfere with," the words "or affect."

The capitalization article, article 115, provides: "The "company in general meeting may at any time and from "time to time pass a resolution that any sum not required for "the payment or provision of any fixed preferential dividend, "and . . . standing to the credit" of certain accounts of the company, "be capitalized, and that such sum be appropriated "as capital to and amongst the ordinary shareholders in the "shares and proportions in which they would have been entitled "thereto if the same had been distributed by way of dividend "on the ordinary shares, and in such manner as the resolution "may direct . . ."

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It is the argument of Mr. Jennings, for the preference stockholders (an argument which found favour with Danckwerts J.), that the court must regard the use of the word "affected," particularly in article 54, and must give it a meaning distinct from its associated words, "modified, dealt with or abrogated"; and that, if the court does that, the conclusion is inevitably reached that the present proposal, which will swell the voting rights of the ordinary shareholders as a body, as compared with the preference stockholders, involves an "affecting" of the rights or privileges of the preference stockholders.

In my judgment, notwithstanding the differences that are to be discerned between these articles and those of the Bristol Aeroplane Co. Ld., we are in this case bound by the decision of this court in *White* v. *Bristol Aeroplane Co. Ld.*[1] and must hold, contrary to Mr. Jennings' argument, that there is no such "affecting" of the rights or privileges of the preference stockholders as entitles them to be summoned to a separate meeting. It is to be noted that this court in *White* v. *Bristol Aeroplane Co. Ld.*,[1] after referring to the two earlier cases of *In re Mackenzie*[2] and *Greenhalgh* v. *Arderne Cinemas Ld.*,[3] decided that the word "affect" in articles of this kind is not to be given so broad a sense as to mean or cover any affecting in a business sense.

Of course, the particular articles which come before the court may be such that, as a matter of construction, the general principle which I have stated is shown to be inapplicable; but I do not think that that is so here. The absence from article 48 of certain sentences which found their place in the corresponding article 62 of the Bristol Aeroplane Co. Ld. does not, in my judgment, create such a distinction. Nor does the absence from article 50 in the present case of the provision that, in the absence of some direction in the resolution creating the new shares, they shall be automatically ordinary shares, even when added to the other differences, cause any difference in result.

It seems to me that if the argument is carried to its logical conclusion in this case, as in *White* v. *Bristol Aeroplane Co. Ld.*,[4] quite absurd results would follow. Carried to its fullest extent, the argument must, I think, mean that any activity on the part of the directors in pursuance of their powers which may in any way affect or touch the value of any of the privileges attached to the preference stockholders, would be rendered ineffective

[1] Ante 65.

[2] [1916] 2 Ch. 450.

[3] [1946] 1 All E.R. 512, 517.

[4] Ante 65.

save with the prior sanction of a special meeting of the preference stockholders. Such a conclusion obviously runs counter to the ordinary conception of the relationship between preference and ordinary stockholders in a company of this character. But even if some limit is put on the word "affect," what follows? The most that can be said here is that the swelling of the number of ordinary shareholders affects the voting rights; but that is not so. As my brother Jenkins pointed out (and the analogy seems to me to be a good one), if it was discovered that there were more adult persons in the country than was thought, on this view the voter could say that his voting rights were "affected" merely because a greater number of other people had similar voting rights. That seems to me to be wrong.

There is, indeed, a third point in the present case which seems to me to point strongly in the same direction. Article 115, which deals with the "Capitalization of Reserves," obviously contemplates, on its fair construction, that if resort is had to the powers conferred thereby, the undistributed profits not required to satisfy the prior claims of the preference stockholders may and will be utilized in paying up in full ordinary shares, or perhaps debentures, to be distributed to the existing ordinary shareholders. There is no hint in article 115 that such a transaction will involve an "affecting" of the rights of the preference stockholders so as (in the result) only to be possible with the prior authority of an extraordinary resolution of the existing preference stockholders. It is true that the words "subject to "the provisions of article 54" would not necessarily be required if in truth the powers of article 115 could only be exercised subject to the prior sanction of such an extraordinary resolution of the preference stockholders. But I think that the absence of any such reference is a strong indication that the sort of thing which is now being done was not regarded, and could not have been regarded, according to the fair interpretation of the article, as involving any modification of the rights, or other affecting of the rights, of the preference stockholders. If in some respects it is thought that the present articles are slightly less favourable, from the point of view of the ordinary stockholders, than were the articles in *White* v. *Bristol Aeroplane Co. Ld.*,[4] on the other hand, in the latter case it was a marked feature of the scheme under debate that the new shares which were to be paid up in the hands of the ordinary stockholders included a block of preference shares sufficient in number to enable the ordinary shareholders to outvote the existing preference stockholders at a meeting of the preference shareholders only. No such feature appears in the present case.

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[4] Ante 65.

The clause in which this word "affected" has been inserted is of a nature very common and well-known to those concerned in this branch of the law. It is headed in these articles "Modification of Rights" (as such clauses are, so far as I know, invariably headed). If modification was only one aspect of the far wider subject-matter of the clause, namely, affecting of rights in any kind of way, as a matter of business or as a matter of law, that would be a curious heading. The answer may well be, as my brother Jenkins suggested, that the word "affected" ought rather to be construed by reference to the three expressions which follow, "modified, dealt with or abrogated"—that is to say, that those last three words should be treated as exegetic of the word "affected"; and, if that be right, at any rate it makes the heading of the article, "Modification of Rights," less misleading.

For the reasons which I have given, I have formed a view different from that which commended itself to Danckwerts J., and this appeal should be allowed.

Jenkins L.J. I agree, and there is very little that I can usefully add, for I think that this appeal is in substance covered by the decision of this court in *White* v. *Bristol Aeroplane Co. Ld.*,[4] as the reasoning in the judgment just delivered by my Lord sufficiently shows. But I may perhaps add this. It is claimed that the issue of further ordinary shares, carrying the normal voting rights accorded by article 69, will "affect" the rights or privileges attached to the preference stock, within the meaning of article 54, and the only right or privilege now in question as allegedly so "affected" is the right of voting. In other words, it is said that the preference stockholders have a right of voting which is in the nature of a right or privilege attached to that class of stock and which will be affected by the issue of further ordinary shares with the normal voting rights accorded to holders of ordinary shares under the articles.

To assess the merits of that contention it is necessary to consider what rights the preference stockholders have in regard to voting, for until that is done one cannot say whether what is proposed will affect those rights or not—as was, indeed, pointed

[4] Ante 65.

out by Romer L.J. in his judgment in *White* v. *Bristol Aeroplane Co. Ld.*[5] I will read the first few lines of article 69 again—the provision, and the only provision, conferring any right of voting on anybody, as I understand these articles—" Subject to any " special rights, restrictions or prohibitions as regards voting " for the time being attached to any special class of shares in " the capital of the company, on a show of hands every member " personally present shall have one vote only, and in the case of " a poll every member shall (subject as hereinafter provided) " have one vote for every share held by him." There is no question of any special rights as to voting in this case. There are certain restrictions (as appears from the latter part of article 69) imposed on the preference stockholders in regard to the receiving of notices and the right to attend and vote at meetings. But there are no special rights of voting here in question, and the only substantive provision conferring any right of voting on the preference stockholders is the portion of article 69 which I have read.

As I understand it, the word " member " in article 69 means member for the time being. I think that that is borne out by the statutory definition of " member " in the Companies Act. By section 25 (2) of the Companies Act, 1929 (section 26 (2) of the Act of 1948): " Every other person who agrees to become a " member of a company, and whose name is entered in its " register of members, shall be a member of the company." Indeed, it is obvious that " member " in this article means member for the time being, and is not confined to a member who became such on or before some particular date. Thus, the right given in terms is a right conferred on every member for the time being of the company, and it is only because the preference stockholders are included amongst the members for the time being of the company that they have any right of voting at all. It seems to me that, where a right of voting is given in those terms, it is impossible for a member of a company to say that it entitles him to object to the right of voting thus provided being enjoyed by any other members for the time being who may become members in respect of shares in the capital of the company issued after he himself has become a member. The right is in terms a right to be enjoyed in common by all shareholders for the time being, and there is no special right attached to any particular class of shares and, in particular, no special

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[5] Ante 65, 81.

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right attached to the preference stock. It is no part of the bargain contained in article 69—or, indeed, in any other article, so far as I have been able to discover—between the company and the preference stockholders or the ordinary shareholders that when new shares are issued they shall not carry the ordinary voting rights provided for by article 69. Indeed, the articles clearly contemplate that, unless some special provision is made in regard to voting rights on the issue of new shares, they shall carry the ordinary right of voting conferred by article 69. It follows, in my opinion, that the rights as to voting conferred on the preference stockholders are such that it is quite impossible to say that those rights are "affected," within the meaning of article 54, by what is proposed to be done here as regards the issue of further ordinary shares.

Accordingly, I agree that this appeal should be allowed.

MORRIS L.J. I agree.

Appeal allowed.

Solicitors: *Slaughter & May, for Middletons, Leeds*

E. D.

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[1950] P. No. 702.]

METCALF *v.* WELLS.

[1952 W. No. 162.]

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Evershed M.R., Jenkins and Morris L.JJ.

Legal Aid—Costs—No order made as to costs of legally aided persons—Duty of court to make order—Legal Aid and Advice Act, 1949 (12 & 13 *Geo.* 6, *c.* 51), *ss.* 2 (2) (*b*), 6 (5), *Sch. III—Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *reg.* 18 (3).

Where a legal aid certificate has been granted under the Legal Aid and Advice Act, 1949, the certificate must be taken to have been validly and properly granted. As a matter of practice the taxing master cannot properly or effectively tax the costs of a party to a proceeding unless he is directed so to do by an Act of Parliament or there is an order of the court directing him so to do. In order to give effect to the imperative directions contained in section 6 (5) of the Act of 1949, as to the payment of a solicitor who has acted for a person receiving legal aid, the court has no option or discretion in the matter but effect must be given to the legal aid certificate and an order made for the taxation of the legally-aided party's costs. It is obligatory to make an order for such taxation. Regulation 18 (3) of the Legal Aid (General) Regulations, 1950, is not limited to the case where the court has made an order for the payment of the costs of the proceedings. Sch. III to the Act of 1949 enjoins taxation in the ordinary way of a legally aided person's costs in all cases not especially provided for by regulation 18 (3).

Brown v. *Brown* [1952] 1 T.L.R. 930; [1952] 1 All E.R. 1018; [1952] W.N. 204 followed.

Frost v. *Frost* [1953] 1 W.L.R. 52; [1952] 2 All E.R. 1125 approved.

Decision of Harman J. in *Page* v. *Page* and of Roxburgh J. in *Metcalf* v. *Wells* [1952] 2 T.L.R. 781; [1952] 2 All E.R. 889; [1952] W.N. 516 reversed.

APPEALS from Harman and Roxburgh JJ.

These two appeals were heard together.

The first appeal, *Page* v. *Page*, was an appeal from a decision of Harman J. In this case the plaintiff, who was a legally aided person, claimed a declaration against his mother's executors that certain property acquired by his mother was held by her upon trust for him. It appeared that at the relevant date the plaintiff was a bankrupt and accordingly whatever interest he might have had in the property had vested in the plaintiff's trustees in bankruptcy and he could not sustain the action. Harman J. took the view that a legal aid certificate should not have been granted and made no order as to costs. By adopting that course he considered that he could get out of the effect of rule 18 (3) of the Legal Aid (General) Regulations, 1950.

The plaintiff appealed against the refusal of the judge to make any order as to costs.

The defendants, who had been served with notice of the appeal, did not appear.

O'Connell Stranders for the plaintiff. The sole question here is whether the judge was bound to make an order for the taxation of the plaintiff's costs or whether he had a discretion to refuse to make any order. The defendants, who have not appeared, will not be affected by any order the Court of Appeal may make. The judge took the view that these proceedings should not have been brought and that he was not bound to make any order. It is submitted that he was wrong in so holding. On the true construction of the Legal Aid and Advice Act, 1949, he was bound to make an order for taxation even if he made no other order. This appears from the provisions of sections 1 (5) (7) (*b*), 2 (2) (*b*). This question has already been

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considered by the Court of Appeal in *Brown* v. *Brown*,[1] where it was held that an order for taxation must be made. The same conclusion was reached in *Frost* v. *Frost*[2] by Willmer J. The taxing master cannot tax unless an order for taxation is made, and without the taxation of the costs a party's legal advisers cannot be paid out of the legal aid fund in accordance with the provisions of the Act.

The court proceeded to hear the second appeal, *Metcalf* v. *Wells*, being an appeal from a decision of Roxburgh J.[3] In this action the plaintiffs, who were legally aided persons, claimed damages. After the plaintiffs' case had been opened, the judge was informed that an offer which had been made previously and which had remained open had been accepted and the case was accordingly settled. The settlement contained no provision with regard to costs. Roxburgh J. was of opinion that the offer should have been accepted from the start and in bringing proceedings the plaintiffs were unreasonable, and the judge forbore to make any order as to costs on the ground that it was no term of the settlement that such an order should be made and accordingly regulation 18 (3) of the Regulations of 1950 did not apply.

The plaintiffs appealed against the failure to make any order as to costs.

The defendants, who had been served with notice of the appeal, did not appear.

P. A. Ferns for the plaintiff. This case is distinguishable from *Page* v. *Page* since in this case Roxburgh J. held that in the circumstances he had no jurisdiction to make any order as to costs. If he had considered that he had a discretion in the matter, he indicated that he would have refused to exercise it in favour of the plaintiff. It is submitted that a legally aided person has a right by virtue of his liability, in certain circumstances, to contribute to the legal aid fund to have his costs taxed so that his legal advisers may be paid. If no order as to costs is made, it means, in effect, that the legal aid certificate is revoked and the benefits which Parliament intended the legal advisers of a legally aided person to obtain from the fund are defeated. While it is true that the plaintiffs will receive no benefit personally from the appeal, the result being merely that their legal advisers will be paid, they are morally interested to see that their advisers are paid. They have in fact contributed to the legal aid fund and it is submitted have a right to see that the Act is operated in accordance with its provisions.

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[1] [1952] 1 T.L.R. 930; [1952] 1 All E.R. 1018; [1952] W.N. 204.

[2] [1953] 1 W.L.R. 52; [1952] 2 All E.R. 1125.

[3] [1952] 2 T.L.R. 781; [1952] 2 All E.R. 889; [1952] W.N. 516.

EVERSHED M.R. The judgment which I am about to deliver is my judgment in both these cases. In each of these appeals the court is asked to reverse the judgment of the judge appealed from (in the one case Harman J. and in the other Roxburgh J.) in so far as those judges, in the form of order which they adopted, forbore from making any order pursuant to the terms of Sch. III to the Legal Aid and Advice Act, 1949, so as to provide for the taxation of the costs in each case of the respective plaintiffs (being legally aided persons) as between solicitor and client, as provided by that schedule. The exact facts of the cases are not, I think, of any great significance. The first case, *Page* v. *Page*, was a case in which the plaintiff had claimed in his writ and pleadings that a certain house, which had been acquired by his late mother, was acquired in fact by her out of moneys provided by him, so that her estate (of which the two defendants were executors) held the property upon trust for him, the plaintiff. In that case it appeared when it was first opened by Mr. Stranders (and I should add, in justice to him, that he had, in fact, come late into the proceedings) that, at the time the house finally became vested free from incumbrances in the plaintiff's mother, the plaintiff was a bankrupt, and, although he was subsequently discharged, Mr. Stranders was fain to concede that he, on behalf of the plaintiff, could not sustain the action unless he could somehow contrive (as he failed in fact to do) to get in from the trustee in bankruptcy the equity in the property. The second case was a case also relating to house property. The two plaintiffs claimed as persons who had acquired from the defendant certain premises and, as they said, the defendant had misrepresented the facts in regard to the title—in particular, in regard to a right of way—the result of which was to diminish the value of that which they bought. They therefore sued in the action for damages.

Now in the first case Harman J. obviously took the view that a legal aid certificate should not have been granted. It may well be that the plaintiff himself forbore to give full information about his bankruptcy, either to his then solicitors or, through them, to the Legal Aid Committee. However that may be, the judge was of opinion that, seeing that he had been at the material time a bankrupt, the action was admittedly not maintainable by him and so it was not a case in which, properly, a certificate should have been granted. He therefore, as a result of a considerable discussion about costs, arrived at the conclusion that, so far as the costs of the proceedings were concerned (and I may say they included a counterclaim) he did not propose to make any order inter partes as to the costs at all; for by taking that line (in his own language) he would be able to get out of the effect of regulation 18 (3) of the Legal Aid (General) Regulations, 1950, made under the Legal Aid and Advice Act, 1949.

In Roxburgh J.'s case, the substance of the matter was the same. It appeared from his judgment that, before the proceedings had started, a person, who was not a party to the action, had made an offer to permit the plaintiffs a right of access over certain land, which offer, on any view of it, very greatly diminished any loss or damage that the plaintiffs could suffer. Further, it appeared that after the case had opened the plaintiffs, through their counsel, Mr. Ferns, informed the judge that they were not proceeding further with the matter, it having been settled—and settled, as I gather and as the judge was informed, upon the terms that the offer which had previously been made and remained open had been accepted. The judge was of opinion that the offer should have been accepted from the start and that in bringing the proceedings the plaintiffs had acted wholly unreasonably; and I rather guess that he thought that those advising the plaintiffs had engaged in the proceedings rather for their own benefit than for any possible advantage which they could bring to the plaintiffs. So Roxburgh J. like Harman J. studiously forbore from making any order at all in the action as to costs. Indeed, it was not open to him to do so, in a sense, because the matter was settled and therefore, as he said, regulation 18 (3) had no application and he was therefore not bound to make the order as to solicitor and client costs which the plaintiffs as legally aided persons sought. He added that if he had a discretion in the matter, then, for the reasons which I have indicated, namely, the circumstances in which the action had been brought and settled, he thought he should not exercise his discretion in the plaintiffs' favour.

The result in each case appears to be that the legal advisers of the respective plaintiffs are left without any means of recovery (in the case of the solicitors) of their proper profit costs and disbursements; and that counsel similarly would get no reward, seeing that the disbursements (namely their fees) would not be paid. That, I think, is quite plainly the result, because it is provided by the Act of 1949 that the effect of the grant of a certificate is that the legal advisers of the legally aided person—that is, the person to whom the certificate has been granted—are disabled from making any claim in respect of their charges against the party. So much appears from section 2 (2) (*b*), which is as follows: "Where a "person receives legal aid in connexion with any proceedings— ". . . (*b*) his solicitor and counsel shall not take any payment in "respect of the legal aid except such payment as is directed by "this Part of this Act to be made out of the legal aid fund."

The effect, therefore, of these orders was to impose a punishment, in a sense, upon the solicitors and counsel. I rather assume that that may have been deliberate in the case before Roxburgh J. but I am not so sure that it was so in Harman J.'s case. Certainly the actual parties themselves would suffer no pecuniary loss, having regard to the section which I have mentioned, unless it could be shown (and plainly it could not in these cases) that any contribution they had been ordered to make would, or would be likely to, exceed the amount of the taxed costs.

It is to be noted that the Act itself in section 6 (5) makes provision about the costs of legally aided litigants in quite imperative terms: "Subject to this Part of this Act, a solicitor "who has acted for a person receiving legal aid shall be paid for "so acting out of the legal aid fund, and any fees paid to counsel "for so acting shall also be paid out of that fund." It is perhaps pertinent to note, having regard to the form of that subsection, that counsel at law have no contractual relationship either with the solicitors who engage them or with the litigant on whose behalf they appear. They cannot therefore legally claim or sue for their fees. But, as a matter of professional decorum and honour, solicitors, who engage counsel and agree a fee with counsel, feel it incumbent upon them to discharge the obligation—the moral obligation—which that engagement imposes, and if therefore they did so the last words of the subsection I have read would apply—"fees paid to counsel . . . shall be paid out of "the legal aid fund."

I think it unnecessary to read many of the paragraphs of the Legal Aid (General) Regulations, 1950—they are merely a background to the case—and I turn at once to regulation 18 (3). That part of the regulation is headed: "Miscellaneous Provisions as "to Costs." This paragraph is the only paragraph in the regulations (and there is nothing in the Act beyond those parts of it

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to which I have already referred) which directly relates to the method whereby the intention of section 6 (5) is to be achieved, namely, the taxation of the bill of costs and the payment out of the Legal Aid Fund. Regulation 18 (3) provides: " Any order " for the payment of the costs of any proceedings to which an " assisted person is a party shall include a direction that his " costs are (in addition to any other direction as to taxation " contained in the order) to be taxed as between solicitor and " client in accordance with the provisions of the Third Schedule " to the Act." It may be said that that paragraph is not very happily phrased, for it obviously gives rise to the conception, which appealed in these two cases to Roxburgh and Harman JJ., that, if there was no order at all for the payment of any costs of the proceedings, then the regulation was excluded and there was nothing else in the Regulations which made it incumbent upon the judges to make an order such as is now sought. In my judgment, regulation 18 (3) has no such exhaustive effect. It provides a certain piece of machinery. But the relevant purpose of the Act is generally expressed in section 6 (5).

As a matter of practice (and I dare say also as a matter of law) the taxing master cannot, or cannot properly or effectively, tax the costs of any party to a proceeding unless he is directed so to do by Act of Parliament or there is an order of the court similarly so directing him. Notwithstanding, therefore, section 6 (5), which is imperative, in the event in each of these cases the taxing master was powerless to tax the costs and, as I think, the intention of the Act as plainly set out in section 6 (5) was therefore defeated.

Now the task of the court in these two cases has been rendered easier by the circumstance that a somewhat similar case came before this court in 1952 in *Brown* v. *Brown*.[1] A commissioner in a divorce suit had taken a point similar to that taken by Roxburgh and Harman JJ. and declined to make any order for costs and consequently felt himself disembarrassed of the provisions of regulation 18 (3). He therefore made no order for taxation as between solicitor and client of the costs of a legally-aided person. This court came to the conclusion that the commissioner was not entitled to adopt that course, which, for reasons already, I hope, sufficiently indicated, would have the effect of frustrating the plain and express intention of this Act of Parliament. The court therefore made an order varying or reversing the order made by the judge below and directed that the costs of the legally aided person should be taxed as between solicitor and client, as provided by Sch. III to the Act. In the course of the leading judgment of Singleton L.J. it is made, I think, quite plain that the intention of the Act, expressed in section 6 (5), must be carried out. There is, therefore, as I apprehend, no discretion in the matter. It may no doubt be that on occasion the court may think, or other persons may think—and may think rightly sometimes, for no human agency is free from the possibility of error—that the Legal Aid Committee has erred in granting a certificate. But the High Court—and still less the Court of Appeal—is not invested with appellate powers over the transactions of the legal aid committees. No doubt it is proper for the court, if it thinks there has been some misuse of public funds, to draw the attention of the Law Society to the matter or publicly to state its view. Further, there are provisions in the regulations whereby the court may revoke, upon proper procedure being followed, a certificate which has been granted. But neither in the case of *Brown* v. *Brown* [1] nor in the two cases with which we are concerned was that procedure adopted. In all three cases, therefore, the certificates must be taken as validly and properly granted and the effects of the grant, as laid down by the statute, must be observed. I think, therefore, that in such circumstances the court has no option in the matter; there is no discretion; and the effect which the statute requires must be given to the certificate by making the necessary order for taxing the costs. It seems to me, if I may venture to say so, that since such an order is obligatory, as I understand it, in every case, it might be better to provide, by regulation or otherwise, that the costs should be taxed, rather than leave it as a matter for the court to deal with; for, apart from cases such as these, other cases may occur in which the court may not have to make any order at all, or by omission the necessary direction may be left out. That, however, is a matter for those responsible for the drafting of these regulations.

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[1] [1952] 1 T.L.R. 930; [1952] 1 All E.R. 1018; [1952] W.N. 204.

I would like to mention certain other matters. For myself, I have felt during the course of the arguments some doubt as to the jurisdiction of the Court of Appeal in this matter, and for this reason. In each of these cases, as in the case of *Brown* v. *Brown*,[1] the real question which this court is being asked to consider is whether the legal advisers of the legally aided person should get the costs which the statute says they should obtain. Neither the appellant nor the respondent in either of these cases is in any way whatever financially interested in this matter before the court, subject only to one point in the second case, to which I will come back in a moment. I have already stated that by section 2 (2) (*b*), once a certificate has been granted and so long as it is outstanding, the legal advisers of the legally aided person cannot ask him to make any payment towards their costs—apart, of course, from any contribution ordered by the Legal Aid Committee. From a monetary point of view, therefore, the appellant in each case is quite unconcerned (so far as I can see) with the result of these appeals. Still more, the respondents in all three cases have been in no way concerned; and their lack of concern is well illustrated by the circumstance that in not one of the three cases have they incurred the expenditure of a futile appearance. I have, therefore, wondered whether there was any lis, any issue, in the proceedings which, according to the statute and R.S.C. Ord. 58, it was competent for the Court of Appeal to entertain. On the whole, I have come to the conclusion that that difficulty should not stand in our way in these cases. It is, I think, true to say that, as a result of the impact of the Legal Aid and Advice Act, 1949, upon the litigation, the order which the respective plaintiffs sought for taxation of their costs in the court below was an order in the action for which they were properly entitled to ask, and, having been deprived of it, it may be said that they are now entitled to come to this court and ask this court to make the necessary direction or order which, on their application, the court below refused to make. But in any case this point and this difficulty clearly were present to the minds of the Court of Appeal in *Brown* v. *Brown*,[2] for Singleton L.J. is reported to have observed: "The difficulty I felt at one time "was whether in those circumstances it was open to this court "to interfere with the order at all." It does not appear from the report exactly how that doubt in the Lord Justice's mind was resolved, but it is obvious that, the doubt having been entertained, it was resolved and the court, by making the order that it did, in effect stated that it had jurisdiction to deal with this matter; and we are, I think, bound by that decision. I therefore say no more about that aspect of the matter.

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[1] [1952] 1 T.L.R. 930; [1952] 1 All E.R. 1018; [1952] W.N. 204.

In the observations which I have just made I indicated a reservation, and it is this: It is a singular feature of the second of these cases that one of the lay litigants to whom a legal aid certificate has been granted for the purpose of prosecuting this appeal has been required to make a contribution. I should, I think, be going back upon the implications of what I have already said if I were to spend any time in commenting upon the circumstance that, as I have already explained, each of these appeals is, in substance, an appeal for the benefit of the legal advisers of the respective litigants and not for the benefit of the litigants themselves. I note that, notwithstanding that fact, a legal aid certificate has been granted in each case to prosecute this appeal. Having noted it, I say no more. Obviously I ought not to say any more. A certificate has been granted, and I have already stated that it is not for us to act in any way in an appellate capacity over the Legal Aid Committee. But I do think it singular, in the circumstances, I am bound to say, that though the two plaintiffs in the second case were required in the court below to make no contribution to the costs of the case, one of them has been required to make a contribution for the purposes of the appeal to this court, though it is an appeal out of which the two plaintiffs cannot derive any conceivable advantage whatever. I do not, of course, know the facts fully, and it may be that the Legal Aid Committee thought it was a proper, fair thing to do, because on reflection they may have felt that the plaintiffs might have been asked to make a contribution at first instance. I have drawn attention to the matter, however, because I venture to think that the Legal Aid Committee might properly reconsider the matter. Assuming, as I do, and must do, that it is proper that the public funds should be used for the purpose of prosecuting these appeals—which are, as I have said, from a pecuniary point of view, exclusively for the benefit of the legal advisers—is it right that the lay litigant should be made to contribute to them? I notice that the contribution is to be paid by instalments, and if they thought there was substance in what I am saying, the Legal Aid Committee might think it appropriate to revise the direction as to contribution so far at any rate as relates to future instalments.

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[2] [1952] 1 All E.R. 1018, 1019.

I think that I have covered all the matters which are relevant for the consideration of these appeals. I observe that in neither case below, so far as I can see, were the imperative terms of section 6 (5) drawn to the attention of Harman J. and Roxburgh J. I observe, further, that the case of *Brown* v.

Brown[3] was not mentioned before Roxburgh J. Since that case there has been another instance of the same point in the case of *Frost* v. *Frost*[4] before Willmer J. He, following the effect of *Brown* v. *Brown*,[5] came to the conclusion, notwithstanding Roxburgh J.'s decision in *Metcalf* v. *Wells*,[6] which was cited to him, that he had no such discretion as Roxburgh J. had supposed —nay, further, that he was bound to make the order for taxation which he was asked to make. I only add that if, contrary to my view, there is a discretion, I do not myself think that the circumstances to which Roxburgh J. alluded in his judgment are proper to be taken into account in depriving the legal advisers of the legally aided person of their proper costs for acting on his behalf. If I were wrong about that, it would inevitably follow, as it seems to me, that the court of first instance would, in effect, be exercising a power to revoke or review the decision of the Legal Aid Committee and impose a kind of punishment upon the lawyers who had acted upon the faith of that certificate.

In the circumstances, I think that both appeals succeed and that in each case the order which was asked for should be made, namely, that the costs of the legally aided litigants respectively should be taxed as between solicitor and client in accordance with Sch. III to the Legal Aid and Advice Act, 1949.

JENKINS L.J. I agree, and would only add a few words on the construction of the Act and the regulations made thereunder. As my Lord has observed, subsection (2) of section 2 of the Act provides: "Where a person receives legal aid in connexion with "any proceedings . . . (*b*) his solicitor and counsel shall not take "any payment in respect of the legal aid except such payment "as is directed by this Part of this Act to be made out of the "legal aid fund." As my Lord has further observed, it is provided in section 6 (5) of the Act: "Subject to this Part of "this Act, a solicitor who has acted for a person receiving legal "aid shall be paid for so acting out of the legal aid fund, and "any fees paid to counsel for so acting shall also be paid out of "that fund"; to which I would add subsection (6): "The "sums payable under the last foregoing subsection to a solicitor "or counsel shall not exceed those allowed under the Third "Schedule to this Act."

Pausing there, the provisions to which I have referred clearly show, to my mind, that an assisted person's costs of proceedings

[3] [1952] W.N. 204.
[4] [1953] 1 W.L.R. 52.
[5] [1952] W.N. 204.
[6] [1952] W.N. 516.

in respect of which a certificate has been granted and remains unrevoked or undischarged are to be paid out of the Legal Aid Fund and, moreover, are not to be paid by any other means.

I would next refer to Sch. III to the Act, referred to in subsection (6) of section 6. It is headed " Remuneration of persons " giving legal aid under Part I." The significance of this schedule is that it contains throughout repeated references to the taxation of costs. Thus paragraph 1 (1) provides: " The sums allowed to " counsel in connexion with proceedings in the . . . Supreme Court " shall be 85 per cent. of the amount allowed on taxation of the " costs." Sub-paragraph (2) provides: " The sums allowed to " counsel in connexion with proceedings in the county court " shall be the full amount allowed on taxation of the costs "; and there are provisions, too, as regards the sums allowed to solicitors, with similar references to taxation of the costs.

Again, passing to paragraph 4 of the schedule, sub-paragraph (1) provides: " Subject to the last foregoing paragraph, " costs shall be taxed for the purposes of this Schedule according " to the ordinary rules applicable on a taxation as between " solicitor and client where the costs are to be paid out of a " common fund in which the client and others are interested." Finally paragraph 5 of the schedule provides: " Regulations may " provide that for the purposes of this Schedule, instead of costs " being taxed in the ordinary way—(*a*) they shall be taxed by " the prescribed person (whether an officer of a court or not); or " (*b*) the amount of the costs shall be fixed (whether by an officer " of a court or not) by an assessment made without a taxation " but with a view to allowing as nearly as may be the same " amount as on a taxation."

So far it seems to me that this position has been reached: As I have said, the assisted person, whose proceedings are covered by a certificate which is in force, is entitled, or his solicitor and counsel are entitled, to have his costs of the proceedings paid out of the legal aid fund and are not entitled to receive payment from elsewhere. Further, Sch. III requires that, in order to ascertain what payment is proper, there shall be a taxation; and in the absence of regulations under paragraph 5 of the schedule prescribing some special method of taxation or of assessment in lieu of taxation, the schedule, in effect, enjoins that the costs in question shall be taxed in the ordinary way. That, it seems to me, suggests, in the absence of any special regulation, that the proper time for making an order for the taxation of such costs (without which in the ordinary way no taxation can proceed) would be the time when an order is made disposing of the proceedings in question. Accordingly, it seems to me that the judges in the two cases under appeal ought, in accordance with the imperative provisions of section 6 (5) and (6) of the Act and Sch. III thereto, to have made orders for taxation of the assisted person's costs in both cases.

I should next refer to regulation 18 (3) of the Legal Aid (General) Regulations, 1950, because, if I may say so with respect, I think the judges misconceived the effect of that provision. It is in these terms: "Any order for the payment of the "costs of any proceedings to which an assisted person is a party "shall include a direction that his costs are (in addition to any "other direction as to taxation contained in the order) to be taxed "as between solicitor and client in accordance with the provisions "of the Third Schedule to the Act." Both judges seem to have read that as meaning that a direction for taxation of an assisted person's own costs was only appropriate in a case in which a court made an order for the payment of the costs of the relevant proceedings, so that, if no order was made as to the payment of any costs, no question arose of giving any direction for the taxation of the assisted person's costs. In my view, to attribute that effect to regulation 18 (3) is to overlook the provisions of Sch. III, which, as I have said, to my mind in effect enjoin the taxation in the ordinary way of the assisted person's costs in all cases not specially provided for by regulations under paragraph 5. Regulation 18 (3) does not, to my mind, cut down the general effect of those provisions but is rather inserted by way of reminder or nota bene, as much as to say that, as it is essential to have a taxation of the assisted person's costs, it should be remembered that (in effect) any order dealing with costs must include the proper direction to that end. I repeat that I cannot regard this provision in the regulations as cutting down the general effect of Sch. III to the Act.

Accordingly, I agree with my Lord that in these two cases the judges were in error in refusing the essential direction for the taxation of the assisted person's costs. It would strictly not have been necessary for us to give reasons for the view we have formed, for, as my Lord has said, the case is covered by the decision of this court in *Brown* v. *Brown*[7]; but, as we are differing from two judges (of whom Roxburgh J. apparently did not have the advantage of being referred to that authority) and as the matter is of some public importance, I have thought it right to state in my own words the reasons why I think, on the true construction of the Act and of the rules, the direction sought for the taxation of the costs of the assisted person ought to have been made in both cases. Accordingly, I agree with my Lord that these appeals should be allowed.

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[7] [1952] W.N. 204.

MORRIS L.J. I am in full agreement with the judgments which my Lords have delivered. It is provided by section 2 (2) (*c*) of the Act of 1949 that an assisted person may be required to make a contribution to the Legal Aid Fund " in respect of the " sums payable thereout on his account." If an assisted person has been required to make a contribution to the fund, he has made that contribution on the basis that there will be payments out of it to his solicitor and counsel. It would be a strange result if, after a payment had been made, an application for taxation of the costs were not granted, with the result that any payment that he had made would simply remain as a contribution to the fund. An assisted person who had so paid, would, I think, desire that his solicitor and counsel should be paid out of the fund; and the provision of section 2 (2) (*b*) would apply the provision to the effect that solicitor and counsel may not take any payment in respect of the legal aid except a payment directed by the Act out of the Legal Aid Fund. It seems to me, therefore, that a person who has paid to the fund would have an interest to make an application to the court that there should be taxation in accordance with Sch. III. But equally I think there would be an interest, even if an assisted person had not been required to make a contribution to the fund. In either case the assisted person would make an application for taxation at the conclusion of the hearing and the application would be one which in my judgment ought to be acceded to. In the result, therefore, if the application is refused, it seems to me that the party applying would have a matter of appeal which he could bring to this court, for he would in the proceedings have made an application which was a proper application and one which should have been granted.

I would only add this. The Master of the Rolls has referred to regulation 11 (4), which deals with the topic of " Discharge and revocation of certificates." Regulation 11 (4) provides: " At any " time during the hearing of any proceedings to which an assisted " person is a party the court may, upon application by or on " behalf of any other party to the proceedings or by the Law

"Society, consider whether the assisted person—(*a*) has wilfully "failed to comply with any regulation as to the information to "be furnished by him; or (*b*) in furnishing any such information "has knowingly made a false statement or false representation; "and on any such application the court may make an order "revoking the certificate or discharging it from such date as may "be appropriate and the court's decision shall be final." Then there is a proviso: "Provided that no order shall be made under "this sub-paragraph until the assisted person has been given an "opportunity to show cause why the certificate should not be "discharged, or, as the case may be, revoked."

Then regulation 12 deals with the effect of discharge and revocation of certificates, and the first three paragraphs are relevant, but I only read paragraph (3), which provides: "Upon "determination of a retainer under this Regulation—(*a*) the costs "of the proceedings to which the certificate related, incurred by "or on behalf of the person to whom it was issued, shall, as soon "as practicable thereafter, be taxed or, as the case may be, "assessed in accordance with the provisions of the Act and these "Regulations; (*b*) the Fund shall remain liable for the payment "of any costs so taxed or assessed."

It is, I think, not without relevance to see the provisions of the regulations in the event of discharge or revocation of certificates which may take place under regulation 11 (4).

As I have already said, I concur fully in the reasons which my Lords have assigned for allowing these appeals.

Appeals allowed.

Solicitors: *J. B. Hoy, Edgware; Bracewell & Leaver, for William E. Gill, Shepherd & Co., Blackpool.*

B. A. B.

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Jan. 14;
Feb. 10.

Jenkins and Morris L.JJ., and Roxburgh J.

Bankruptcy—Rating—Judgment obtained in court of summary jurisdiction for sum in respect of water rates—In default sum to be levied by distress—Final judgment—Bankruptcy notice validly issued in respect of judgment debt—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 19—*Summary Jurisdiction Act,* 1879 (42 *&* 43 *Vict. c.* 49), *ss.* 6, 35—*Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 1 (1) (*g*).

The Ampthill Rural District Council, as statutory water undertakers, obtained on April 26, 1951, an order against a debtor in a court of summary jurisdiction for the payment of £2 12s. 6d., being a water rate which the council claimed in respect of premises owned by the debtor, together with the further sum of 3s. costs. The court ordered payment of those sums forthwith "and in default "of payment that the sum due hereunder be levied by distress and "sale of the defendant's goods." On August 22, 1952, a bankruptcy notice was served on the debtor in respect of the sum of £2 15s. 6d., being the total sum owing under the judgment. The registrar dismissed an application by the debtor to set the bankruptcy notice aside on the ground that he had a counterclaim or set-off. The Divisional Court allowed an appeal from that decision on the ground that the words in the order of the court of summary jurisdiction that in default of payment the sum due "be levied by "distress" precluded the issue of a bankruptcy notice. On appeal:—

Held, that the order of the court of summary jurisdiction was "a final judgment or final order" within section 1 (1) (*g*) of the Bankruptcy Act, 1914; that the amount set out in the bankruptcy notice was properly recoverable summarily as a civil debt under sections 6 and 35 of the Summary Jurisdiction Act, 1879; that the fact that in the order as drawn up it was provided that in default of payment the sum due might be levied by distress and sale of the debtor's goods did not diminish the validity and effectiveness of the order; that the order remained a final order against the debtor and one within the words "execution thereon not having been "stayed," of section 1 (1) (*g*); that a court of summary jurisdiction had no power or authority to make an order that no bankruptcy notice should be issued in respect of the sum due, and that what could not have been done by express order could not be regarded as having been done by implication; that there was nothing which precluded the issue of a bankruptcy notice; and that, since the debtor had not substantiated the grounds of his appeal to the registrar, the appeal of the council should be allowed.

Order of the Divisional Court reversed.

APPEAL from the Divisional Court (Harman and Upjohn JJ.).

This was an appeal by the Ampthill Rural District Council, as rating authority, against a decision of the Divisional Court

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allowing an appeal from the registrar and discharging a bankruptcy notice which the council had served on the debtor in respect of an unsatisfied judgment for the sum of £2 15s. 6d. owing to the council for a water rate and costs.

The Divisional Court discharged the bankruptcy notice on the ground that the order of the court of summary jurisdiction ordering payment of the water rate provided that in default of payment the sum due should be "levied by distress," and that accordingly the issue of a bankruptcy notice was precluded. The facts are more fully stated in the judgment of the court.

John Davidson for the council. The Divisional Court was wrong in discharging the bankruptcy notice. A water rate, unlike a general rate, is recoverable by action as a civil debt under section 38 (3) of the Water Act, 1945.[1] General and special rates are not so recoverable, but payment of such unpaid rates may be enforced by bankruptcy proceedings: *In re McGreavy.*[2] The Divisional Court has held that, if a special method of enforcing a judgment is specified, all other remedies are excluded. There is nothing in section 19 of the Summary Jurisdiction Act, 1848, or in section 35 of the Summary Jurisdiction Act, 1879, which suggests that distress is to be the creditor's only remedy in a case such as this. Those Acts do not limit the effect of section 38 (3) of the Water Act, 1945. If any limit can be implied, it can only be in the mode of execution, and bankruptcy proceedings are not execution: see *In re A Bankruptcy Notice.*[3] It cannot curtail the right to take bankruptcy proceedings.

Proceedings under the Bankruptcy Act, 1914, are independent proceedings. Nothing should be implied in the Summary Jurisdiction Acts which would interfere in any way with the bankruptcy jurisdiction. The magistrates' order was a "final order" against the debtor under section 1 (1) (*g*) of the Act of 1914 and the bankruptcy notice was valid.

The debtor appeared in person.

Cur. adv. vult.

February 10. JENKINS L.J. I will ask Morris L.J. to read the judgment of the court in this case.

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[1] Water Act, 1945, s. 38 (3): "The "water rate payable by any person "may after a demand therefor be "recovered from him by the under- "takers either summarily as a civil "debt, or as a simple contract debt "in any court of competent jurisdic- "tion. . . ."

[2] [1950] Ch. 269; 66 T.L.R. (Pt. 1) 389; [1950] 1 All E.R. 442.

[3] [1898] 1 Q.B. 383.

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MORRIS L.J. On April 26, 1951, the rating authority for the Ampthill Rural District obtained an order against the debtor in the court of summary jurisdiction at Ampthill for the payment of £2 12s. 6d. and also for the payment of the sum of 3s. 0d. costs. The sum of £2 12s. 6d. represented a water rate which the council, as statutory water undertakers, claimed against the debtor in respect of a house which he owned called " Woodfield " at Aspley Guise. It is provided by the Water Act, 1945, s. 38 (3), that the water rate payable by any person may after a demand therefor be recovered from him by the undertakers either summarily as a civil debt or as a simple contract debt in any court of competent jurisdiction. The order of the court at Ampthill was drawn up in the following words: " It is adjudged " that the defendant pay the plaintiff the sum of £2 12s. 6d. for " debt and the sum of 3s. 0d. for costs to be paid forthwith and " in default of payment that the sum due hereunder be levied " by distress and sale of the defendant's goods."

On August 22, 1952, a bankruptcy notice, dated August 21, 1952, was served on the debtor at the instance of the council in respect of the sum of £2 15s. 6d. The bankruptcy notice was in prescribed form and was issued by the Brentford county court. The debtor filed an affidavit stating that he applied to set aside the bankruptcy notice on the ground that he had a counterclaim, set-off or cross-demand which equalled or exceeded the amount claimed by the council and which he could not have set up in the action or other proceedings in which the judgment or order was obtained against him. The debtor did not set out any particulars of his counterclaim, set-off or cross-demand. The registrar heard the debtor's application on September 10, 1952, when the debtor appeared in person. The registrar decided that no counterclaim or set-off had been established and dismissed, with costs, the application to set aside the bankruptcy notice.

The debtor was granted leave to appeal against the order of the registrar and an extension of time for entering his appeal. He filed his notice of appeal on October 18, 1952, and in it he set out his grounds of appeal, as follows:—" (1) That the hearing " of the case at Ampthill petty sessions was invalid; (2) that ' even if the said hearing at Ampthill were valid, the appellant ' had the right to set off as a contra against the £2 15s. 6d. " demanded, money previously paid under protest on rates on " ' Eton Lodge,' Woburn Sands East (because of a caretaker),

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"which had not been the subject of any hearing at Ampthill or "elsewhere; (3) that certain information given by the respon- "dents was misleading and erroneous; (4) certain expenses "claimed by the respondents were needlessly incurred."

When the matter came before the Divisional Court, where the debtor again appeared in person, the court experienced difficulty in finding out the nature of the counterclaim, and they expressed no concluded view either for or against its validity. The court raised, however, a point not advanced or suggested by the debtor himself, to the effect that the words contained in the judgment or order of the court at Ampthill, i.e., the words "and in default of payment that the sum due thereunder be "levied by distress and sale of the defendant's goods," were words which imposed a limitation, and that they precluded the issue of a bankruptcy notice. Feeling it incumbent on them to take notice of the point so raised, and holding it to be effective, the court allowed the appeal and discharged the bankruptcy notice. By leave appeal is now brought to this court against the order made by the Divisional Court.

Certain other facts were before us and may be briefly mentioned, though in our judgment they have no direct bearing on the questions to be determined. On the same day, April 26, 1951, as the order for payment of the £2 15s. 6d. was made, the court of summary jurisdiction at Ampthill issued warrants of distress in respect of certain general and special rates levied upon the debtor. The warrants were for sums totalling £64 14s. 8d., which represented general and special rates partly on the house "Woodfield" and partly on another house belonging to the debtor called "Eton Lodge." For those rates no recovery by action was possible (see *In re McGreavy* [1]) though for the amount of them there could be a petition in bankruptcy and proof in bankruptcy. To the warrants for distress so issued there was a return of nulla bona. Before the return was made, the debtor had appealed to quarter sessions against the issue of the distress warrants, but quarter sessions held that as the appeal to them was before levy it was premature (see *Reg.* v. *London Justices* [2]). The £64 14s. 8d. did not include the £2 12s. 6d. or any water rate.

It may be convenient to deal first with the question whether the debtor has established the principal point which before the Divisional Court he had intended to raise, i.e., whether he had a counterclaim, set-off or cross-demand which equalled or exceeded the amount of £2 12s. 6d. claimed by the council and which he could not have set up in the proceedings in the Ampthill court. The submission of the debtor was that in respect of the house "Eton Lodge" he had paid certain rates under protest and could claim their return. No documentary material is before the court, and some of the contentions of the debtor are disputed by the council. The rates in question were apparently paid in 1949 and related to a period of more than a year. The debtor was hoping to sell "Eton Lodge." At the suggestion of a potential purchaser, he lodged a caretaker in the house so as to avert the risk, deemed to be a real one, that some squatter might enter the house and remain there. After a demand for rates, the debtor says that he orally challenged his liability to pay, but did so under protest. The council dispute the suggestion that payment was made under protest and submit that no objection to the payment was raised until later. The debtor did not, however, appeal, and took no action. On the facts as presented to us and so far as we could ascertain them, it was not, in our judgment, demonstrated that the debtor has a claim to the return of the rates which he voluntarily paid. Whatever may be the precise facts, it is sufficient to say that the debtor did not "satisfy" us, any more than he satisfied the registrar, that he had a counterclaim, set-off or cross-demand.

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[1] [1950] Ch. 269.

[2] [1899] 1 Q.B. 532; sub nom. *In re Justices of London; Ex parte Boyne*, 15 T.L.R. 196.

We pass, therefore, to consider the aspect of the matter which was raised by the Divisional Court and which guided them to their conclusion. It is provided by section 1 (1) (*g*) of the Bankruptcy Act, 1914: "A debtor commits an act of bankruptcy "in each of the following cases . . . (*g*) If a creditor has "obtained a final judgment or final order against him for any "amount, and, execution thereon not having been stayed, has "served on him . . . a bankruptcy notice under this Act, and "he does not . . . either comply with the requirements of the "notice or satisfy the court that he has a counter-claim set-off or "cross-demand which equals or exceeds the amount of the "judgment debt or sum ordered to be paid, and which he could "not set up in the action in which the judgment was obtained, "or the proceedings in which the order was obtained: For the "purposes of this paragraph and of section 2 of this Act, any "person who is, for the time being, entitled to enforce a final

" judgment or final order, shall be deemed to be a creditor who " has obtained a final judgment or final order."

In our view, there was " a final judgment or final order " against the debtor. Furthermore, execution was not stayed. It becomes necessary, therefore, to consider the meaning and effect of the final words in the judgment or order of the court at Ampthill, *i.e.*, the words " and in default of payment that " the sum due thereunder be levied by distress and sale of the " defendant's goods." It is said that the presence of those words results in a limitation, with the consequence that, as distress is expressly mentioned, the issue of a bankruptcy notice is precluded.

Section 35 of the Summary Jurisdiction Act, 1879, is in the following terms: " Any sum declared by this Act, or by any " future Act, to be a civil debt, which is recoverable summarily, " or in respect of the recovery of which jurisdiction is given by " such Act to a court of summary jurisdiction, shall be deemed " to be a sum for payment of which a court of summary jurisdiction has authority by law to make an order on complaint " in pursuance of the Summary Jurisdiction Acts: Provided " as follows: (1) A warrant shall not be issued for apprehending " any person for failing to appear to answer any such complaint; " and (2) An order made by a court of summary jurisdiction for " the payment of any such civil debt as aforesaid or of any " instalment thereof, or for the payment of any costs in the " matter of any such complaint, whether ordered to be paid by " the complainant or defendant, shall not, in default of distress " or otherwise, be enforced by imprisonment, unless it be proved " to the satisfaction of such court or of any other court of summary jurisdiction for the same county borough or place, that " the person making default in payment of such civil debt " instalment or costs either has, or has had since the date of " the order, the means to pay the sum in respect of which he " has made default, and has refused or neglected, or refuses or " neglects, to pay the same, and in any such case the court " shall have the same power of imprisonment as a county court " would for the time being have under the Debtors Act, 1869, " for default of payment if such debt had been recovered in that " court, but shall not have any greater power. Proof of the " means of the person making default may be given in such " manner as the court to whom application is made for the " commitment to prison think just, and for the purposes of such

" proof the person making default and any witnesses may be " summoned and examined on oath according to the rules for " the time being in force under this Act in relation to the " summoning and examination of witnesses, or if no such rules " are in force, to the rules for the like purpose made in pursuance " of the Employers and Workmen Act, 1875."

It seems plain from a reading of the section that in the present case the wording of the order would not preclude its enforcement by imprisonment upon proof of means to pay as prescribed in the section. If, after the making of the order, there was a failure to pay, as was the case here, there might have been an application for a warrant of distress upon the debtor's goods. Inasmuch as warrants of distress issued on April 26, 1951, for £64 14s. 8d. met with a return of nulla bona, there would have been no point in making application for a warrant of distress for £2 15s. 6d. But there is nothing to exclude the applicability of that part of section 35 (2) which may apply " in default of distress or otherwise."

In conjunction with section 35 reference should also be made to section 6 of the Summary Jurisdiction Act, 1879, which is in the following terms: " Where under any Act, whether past " or future, a sum of money claimed to be due is recoverable " on complaint to a court of summary jurisdiction, and not on " information, such sum shall be deemed to be a civil debt, and " if recovered before a court of summary jurisdiction shall be " recovered in the manner in which a sum declared by this Act " to be a civil debt recoverable summarily is recoverable under " this Act, and not otherwise; and the payment of any costs " ordered to be paid by the complainant or defendant in the " case of any such complaint shall be enforced in like manner " as such civil debt, and not otherwise."

The issue of distress warrants is provided for by section 19 of the Summary Jurisdiction Act, 1848, which is in the following terms: " Where a conviction adjudges a pecuniary penalty " or compensation to be paid, or where an order requires the " payment of a sum of money, and by the statute authorizing " such conviction or order such penalty, compensation, or sum " of money is to be levied upon the goods and chattels of the " defendant by distress and sale thereof, and also in cases where " by the statute in that behalf no mode of raising or levying " such penalty, compensation, or sum of money, or of enforcing

" the payment of the same, is stated or provided, it shall be law-" ful for the justice or justices making such conviction or order, " or for any justice of the peace for the same county, riding, " division, liberty, city, borough, or place, to issue his or their " warrant of distress for the purpose of levying the same, which " said warrant of distress shall be in writing under the hand and " seal of the justice making the same; and if after delivery of " such warrant of distress to the constable or constables to whom " the same shall have been directed to be executed sufficient " distress shall not be found within the limits of the jurisdiction " of the justice granting such warrant, then, upon proof alone " being made on oath of the handwriting of the justice granting " such warrant before any justice of any other county or place, " such justice of such other county or place shall thereupon make " an indorsement on such warrant, signed with his hand, " authorizing the execution of such warrant within the limits " of his jurisdiction; by virtue of which said warrant and indorse-" ment the penalty or sum aforesaid, and costs, or so much " thereof as may not have been before levied or paid, shall and " may be levied by the person bringing such warrant, or by the " person or persons to whom such warrant was originally directed, " or by any constable or other peace officer of such last-mentioned " county or place, by distress and sale of the goods and chattels " of the defendant in such other county or place."

A consideration of these sections leads us to the view that the amount set out in the bankruptcy notice was properly recovered as a civil debt recoverable summarily. The fact that in the order as drawn up it is provided that, in default of payment, the sum due may be levied by distress and sale of the debtor's goods does not diminish the validity and effectiveness of the order. The order is and remains a final order against the debtor —and one within the words " execution thereon not having been " stayed." If the concluding words in the order had not been expressly inserted, the power of the court to issue a distress warrant would not have been affected. Whether they inserted those words or not, the court of summary jurisdiction had no power or authority to make an order that no bankruptcy notice should be issued in respect of the sum adjudged to be due. That which they could not have done by express order cannot be regarded as having been done by implication. In our judgment there was nothing which precluded the issue of a bankruptcy notice. The debtor did not substantiate any contentions denoted

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under (1) or (3) or (4) of his notice of appeal dated October 18, 1952. Accordingly, for the reasons which we have indicated, we consider that the registrar came to the correct conclusion and that this appeal should be allowed and his order restored.

Appeal allowed.

Solicitors: *Crossman, Block & Co. for Sharman & Trethewy, Ampthill, Beds.*

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In re DICK. KNIGHT *v.* DICK AND OTHERS.

[1951 D. 1378.]

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Feb. 2, 3, 4.

Evershed M.R., Jenkins and Morris L.JJ.

Will—Power of appointment—Fraud on power—Appointment to object with intent and so as to benefit non-object.

A testatrix, who died in 1950, had a power of appointment over a share in certain trust funds bequeathed by her father. The power was exercisable in favour of brothers or sisters or their issue, and in default of a valid appointment there was provision for accrual to the other like portions bequeathed to her brothers and sisters. By her will dated May 28, 1947, and a codicil thereto, the testatrix appointed her share to a favourite sister, providing that if the sister did not survive her for more than one month, the appointment should be to a specified nephew. Contemporaneous with the will was a formal memorandum (the last of many accompanying her many wills) in which she desired the appointee, but "without imposing any trust or legal obligation," to provide an annuity of £800 per annum free of income tax for a non-object of the power. In the events which happened, if that proposal had been effected it would have used a very substantial portion of the appointed fund. She further requested that, if the proposed annuitant died within one month of her death, the appointee should, instead, provide an annuity of £150 per annum free of tax to the daughter of the deceased annuitant. A few days before she died the testatrix wrote a letter to the appointee to be opened after her death, in which she revised her wishes as expressed in the memorandum. The effect, however, if the revised wishes were carried out, would still have been that the greater part of the appointed funds would have been applied for the benefit of persons who were not qualified to be objects of the power:—

Held, that the appointment was a fraud on the power, for the proper inference to be drawn from the facts was that the appointor had intended, and had deliberately attempted by all means available

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DICK.

to her, to benefit a non-object of the power. It appeared that that was her purpose in making the appointment. It was not her purpose to benefit the appointee, hoping incidentally that the appointee would act towards the non-objects in the way she had suggested.

In *In re Crawshay* [1948] Ch. 123 the test applied had been whether the appointee was subjected to such moral suasion as would lead him to do what the appointor wished, but that test and the propositions formulated by Cohen L.J. at p. 134, were stated in relation to the facts of that case and were not intended to be an exhaustive formulation of what amounted to frauds on powers. The general test was as stated by Lord Parker of Waddington in *Vatcher* v. *Paull* [1915] A.C. 372, 378.

Vatcher v. *Paull* [1915] A.C. 372 followed. *In re Crawshay* [1948] Ch. 123; 64 T.L.R. 67; [1948] 1 All E.R. 107 explained.

Decision of Wynn-Parry J. affirmed.

APPEAL from Wynn-Parry J.

The following statement of facts is taken substantially from the judgment of Evershed M.R.:—By the will of William Bruce Dick, who died in 1905, considerable personal property, in the form of shares in companies and a large residue, was bequeathed in such a way that the youngest of his children, Mrs. Minnie Tennant Sherman (who died in 1950 without issue), had certain limited powers of appointment, both in respect of the shares and of the residue. The objects of the powers were her own brothers or sisters and their respective issue; and the testator's will provided that, in default of the exercise of those limited powers, or of a valid exercise of those powers, the proportions of the testator's shares and of the residue (of the income of which Mrs. Sherman had been in enjoyment during her life) should accrue to the other like portions the trusts of which on her death were still subsisting.

Mrs. Minnie Sherman was born in February, 1877. In 1918 she married a Mr. Sherman, who was the widower of one of her own sisters. Mr. Sherman died in 1923 and, therefore, during the remaining 27 years of her life Mrs. Sherman was a widow without any children. The appellant, Miss Dick, was Mrs. Sherman's elder sister. She was six years older than Mrs. Sherman, but the two sisters were, by natural affinity and in the circumstances which affected their lives, thrown closely together, and this affinity increased after Mr. Sherman's death. In 1940 the appellant, Miss Dick, went to live with her sister, Mrs. Sherman, and they lived together in Cornwall in Mrs. Sherman's house from 1940 until 1948. In 1948 Mrs. Sherman went to live with a Mr. and Mrs. Claydon, for whom she had acquired considerable affection, and she remained with them for two years until she died in 1950.

Mr. Claydon had entered the service of Mrs. Sherman in the capacity of gardener and handyman in 1926, when he was about 23 years old. In 1929 he married, and in 1931 a daughter was born, Pamela, who became the goddaughter of Mrs. Sherman.

Mrs. Sherman made a number of wills beginning, so far as the evidence showed, with a will in 1936. From that date onwards she made many more and, from 1938 onwards, she made a contemporaneous memorandum with each will in which she expressed her wishes as to the provisions which she wanted made for the Claydons. Each will and contemporaneous memorandum were succeeded speedily by a codicil, only to be replaced by another will after a short interval. There was evidence that during the eight years when the two sisters cohabited, they frequently discussed together the dispositions they were going to make, and, in particular, they discussed the subject-matter of the memoranda. Miss Dick herself made a will in favour of Mrs. Sherman, which would, of course, have operated if Miss Dick had predeceased her sister, but, though Mrs. Sherman was six years younger than Miss Dick, she apparently never considered the possibility that she might survive Miss Dick. Mrs. Sherman consulted a solicitor at Truro, a Mr. Harvey, somewhat closely about her affairs and her testamentary dispositions and he witnessed many of the documents; but there was no evidence of what advice he gave her at any particular time.

Mrs. Sherman's last will was dated May 28, 1947. In one important respect it differed from the earlier wills she had made. In the earlier wills Mrs. Sherman had assumed always that Miss Dick would survive her and, in appointing the funds to Miss Dick, she had made no provisions in the event of Miss Dick predeceasing her. But in her last will she made provision, not for the predecease of Miss Dick, but for the event of Miss Dick not surviving her for one calendar month. If Miss Dick survived her sister for a calendar month she was to be the sole executor and the appointee of her sister's share of residue. If she did not so survive, Mrs. Sherman provided that the appointee would be a nephew, a Colonel Pardington. There followed a number of small gifts and legacies; and among the legatees the Claydons appeared prominently; the final residue, which was unsubstantial, was also left to Mr. Claydon. The greater part of the property that Mrs.

Sherman enjoyed during her lifetime was the shares or portion which she took under her father's will, and these were all subject to the limited powers of appointment.

In September, 1947, Mrs. Sherman executed a codicil because her will had covered only the original 12/100ths of residue and parts of certain other shares had accrued to her. Further, the will made no reference to the portions of the specific companies' shares bequeathed by her father, and the codicil was accordingly required to fill that gap.

On the same day as the last will she made the following memorandum: "Whereas by my will dated May 28, 1947, I have "exercised the power of appointment given to me by the will of "my late father William Bruce Dick by appointing that the "trustees thereof shall after my death stand possessed of the "share of the trust funds in which I have a life interest In trust "for my sister Fanny Ridehalgh Dick absolutely or if she shall "not survive me for the space of one calendar month then for "my nephew George Evelyn Pardington absolutely Now I "hereby declare that it is my wish but without imposing any "trust or legal obligation that (i) My said sister or my said "nephew as the case may be shall provide out of the said funds "so appointed by me as aforesaid an annuity of £300 to Francis "Arthur Claydon of Ashdown Playing Place Kea Cornwall during "his life to be payable by quarterly payments the first payment "to be made at the expiration of three calendar months from "my death (ii) My said sister or my said nephew as the case "may be shall in addition to providing the said annuity make "over and transfer into the name of the said Francis Arthur "Claydon out of the said trust funds investments and property "so appointed to her or him as aforesaid as soon as she or he "conveniently can do so securities producing at the date of "transfer an income which with the said annuity will bring the "annual income of the said Francis Arthur Claydon up to "the sum of £800 per annum free of income tax at the rate then "prevailing in addition to the property and chattels given to him "by my said will (iii) If the said Francis Arthur Claydon shall "not survive me for the period aforesaid my said sister or my "said nephew as the case may be shall pay the sum of £150 "per annum free of income tax to my goddaughter Pamela "Frances Claydon until she shall attain the age of twenty-one "years and thereupon shall transfer into the name of the said "Pamela Frances Claydon securities forming part of the said

" trust funds sufficient to provide an income of £150 free of " income tax at the rate then prevailing And lastly I declare " that this memorandum shall not be deemed to have any testa- " mentary character or effect."

That memorandum was prepared by Mr. Harvey, who had attested her will, as he attested her later codicil. It differed from the earlier memoranda, and in particular from its immediate predecessor, in that the income of £800 that F. A. Claydon was to have, was to be free of income tax—a benefit not previously indicated in the earlier memorandum.

On May 16, 1950, a fortnight before she died, Mrs. Sherman wrote the following letter to her sister, Miss Dick: " Frankie " Darling, this is just a business letter and my last wish as " regards my will. After much consideration and due thought " for every one I should like the old arrangements made in 1947 " and typed at Harveys as regarding my shares to still stand " good but all to go to Pamela Frances Claydon. I wish £10 " per week to be paid to Lucy and Claydon if still together, " should he be living with any other woman the £10 to be paid to " Lucy on the death of both to revert back to Pamela's shares. " I know I can trust you and Evelyn " [Colonel Pardington] " to " carry this out for me as this is my last and sincere wish for " them for all their care and love for me "; the letter was signed " Minnie T. Sherman."

The evidence by affidavit as to the two alternative appointee's appreciation of his or her responsibility towards the Claydons was as follows; Miss Dick said:

" To the best of my recollection it was in or about the year " 1940 that Mrs. Sherman first told me that she would like me " to make some provision for Mr. and Mrs. Claydon in the event " of her predeceasing me. This matter was discussed between " us from time to time and Mrs. Sherman mentioned various " weekly sums at different times, but she never mentioned a " capital sum. I should in any event have wished to make pro- " vision for them as I thought that they had been very kind and " helpful to Mrs. Sherman and I therefore gladly agreed to " her suggestion. In making the suggestion, however, she " emphasized on every occasion on which the subject arose, that " it was entirely a matter for me whether or not to agree to carry " it out when the time came." After stating that she had not seen any of these memoranda, particularly the last one, she said, notwithstanding her statement that she " gladly agreed " to the suggestion made: " I do not feel even morally bound to carry "out Mrs. Sherman's wishes, and, from our conversations on "the subject of her wishes, I am quite certain that she would "not have expected me to feel so bound"; adding that she did not propose, if she was successful in the matter, to carry out Mrs. Sherman's wishes in full but proposed to make certain other dispositions. Colonel Pardington said: "Some years ago . . . "Mrs. Sherman . . . told me that she was thinking of appointing "in my favour her share of the testator's estate and that she "would like me to 'look after' Mr. and Mrs. Claydon. She did "not mention the amounts of any payments that she would like "me to make to them, but I understood that she was anxious "that they should not be left destitute. I thought nothing more "about the matter and she did not mention it to me again and "it was not until after her death that I became aware of the "contents of her will or the written wishes on the subject of "benefactions to the Claydons which she left with her will." He then said that he also would make provision but not to the extent that Mrs. Sherman had suggested. Mr. Claydon also made an affidavit. He said: "(13) Some years before her death "Mrs. Sherman told me that she proposed to make some "arrangements for me by will but emphasized that she was not "in a position to make the greater part of those dispositions "bindingly effective. She said that most of her property would "pass to a member of her family and it would depend entirely "on him or her whether I received the provision which she hoped "to make for me. (14) I cannot remember when Mrs. Sherman "first mentioned the making of some provision on these lines "but believe that it was shortly before I joined the Royal Air "Force" [during the war] "and that the statement was made "in order to relieve my wife and myself of worry." That was echoed by Mrs. Claydon, but she added: ". . . At Easter 1948 "or 1949 she [Mrs. Sherman] mentioned a sum of £800 per "annum free of tax in this connexion, but I cannot remember "exactly what she said."

There was also an affidavit by Mrs. England, a mutual friend. She said: "Mrs. Sherman added that, to some extent, the "carrying out of these bequests would depend entirely on the "goodwill of her family since (as she had in fact explained to "me orally previously) she was under her father's will able to "leave her money only to a member or members of her family."

Wynn-Parry J. held that in these circumstances the appointment made by Mrs. Sherman constituted a fraud on the power and was invalid. The first defendant (Miss F. R. Dick) appealed.

G. A. Rink for Miss F. R. Dick, the appointee. The appointment is valid. There was no pre-appointment bargain between the appointor and her sister, Miss Dick, as to the Claydons, for although they had discussed the matter together Miss Dick did not know in any detail what provision Mrs. Sherman wished to make for the Claydons; she did not know of the existence of the memorandum of wishes, nor had they ever discussed the handing over of a capital sum. Still less was there any bargain between Mrs. Sherman and the alternative appointee, Colonel Pardington. In absence of a bargain an appointment is valid unless, as in *In re Crawshay*,[1] it is proved that the appointor believed, when making the appointment, that the appointee would be under an irresistible moral suasion to carry out the appointor's wishes to benefit a non-object. In *In re Crawshay* [1] Jack Crawshay was selected as the appointee because the appointor thought that he would be amenable to suasion, but on the facts of the present case there was no belief that irresistible suasion would be brought to bear on the appointee. Mrs. Sherman repeatedly expressed doubt as to whether the appointee would carry out her wishes. She certainly hoped that her sister would do something for the Claydons but she had no fixed belief that either Miss Dick or Colonel Pardington would carry out anything as substantial as her suggested provision, and Miss Dick's affidavit shows that she would not, in fact, have done so. Even if the object of making the appointment to Miss Dick was to benefit the Claydons (and that is not admitted), as long as Mrs. Sherman merely hoped that that would be the effect of the appointment, the appointment would not be invalid. It would only be invalid if it had been made with intent to benefit the Claydons and in the belief that Miss Dick, or Colonel Pardington, would be under irresistible moral suasion, whether imposed by the appointor's expression of wishes or by third parties, to give effect to the appointor's wishes, so that, even though there had been no actual bargain, a failure to act in accordance with the appointor's wishes would be regarded by the appointor as a breach of faith with her. Most cases of moral suasion have been where the appointee is driven to do something by the wishes of some person other than the appointor, but I concede that moral suasion from the appointor herself might be sufficient in exceptional cases. A distinction must, however, be drawn between the expressed wishes of the appointor and the personal feelings of the appointee herself. Wynn-Parry J. laid emphasis on the appointee's view that it was right to do something for the Claydons and he suggested that in some way her own feelings operated as moral suasion. I submit that her personal feelings, uninfluenced by the appointor or by third parties, were irrelevant as suasion, for suasion must be a yielding to something from outside.

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[1] [1948] Ch. 123.

A mere belief, or even a bargain, that an appointment will benefit non-objects is not sufficient to make it invalid unless that was the primary intention of making the appointment. If the primary intention is to benefit the appointee, hoping that some incidental benefit will accrue to the non-objects, the appointment will be good. But if the purpose and intention of the appointment is to benefit a non-object to a substantial extent (and admittedly the proposed provision for the Claydons is substantial), it will be bad. Mere knowledge by the appointor that the appointee approves of the non-objects as deserving and is likely to do something for them as a matter of his or her own wishes and in answer to the dictates of his or her own conscience will not vitiate an appointment, particularly if nothing is said to the appointee as to what the appointor intends and provided that the intention of the appointment is valid. For example, an appointment to a daughter (an object) who is about to marry may be good even though the appointment is made on the basis that she will resettle in favour of her issue and her husband (a non-object). The appointor would know that the daughter would be subjected to powerful persuasion by the husband, but the appointment is not invalid, for the dominant object is to benefit the daughter. In *In re Turner* [2] the appointment was to two objects on condition that they resettled. The dominant (as distinct from a mere incidental) intention was to benefit them and the appointment was not vitiated by the bargain to resettle. That sort of case is not contrary to *In re Crawshay* [3]; it is outside it. The propositions stated by Cohen L.J. in *In re Crawshay* [4] were based on the assumption that the intention and purpose of the appointment there made was to benefit non-objects, and it was clear there that the appointment would not have been made but for the expectation of benefiting the non-objects. It was observed further in *In re Turner* [5] that the appointment would not have been vitiated if, instead of there being a bargain, the trustees had merely known that the intention of the beneficiaries would be to resettle or that they would have been under strong pressure to do so. *Pryor* v. *Pryor* [6] is a case on the other side of the line, for there the appointment would not have been made but for the knowledge of what the appointees would do. *In re Crawshay* [7] is distinguishable from this case because, first, there was no extraneous moral suasion on Miss Dick and any influence was limited to the expression of wishes by Mrs. Sherman herself. Secondly, the appointment was primarily to benefit Miss Dick. Finally, it was not clear on the evidence that the appointment would not have been made but for the expectation that Miss Dick would carry out her wishes. *In re Crawshay* [7] is the limit of the doctrine which must not be stretched too far so as to defeat a valid exercise of the power. [Counsel referred to *Topham* v. *Duke of Portland*,[8] where the daughter was merely a passive instrument; *In re Marsden* [9]; *In re Crawshay* [10] (the first case of that name), and *Vatcher* v. *Paull*.[11]]

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[2] (1883) 28 Ch.D. 205.

[3] [1948] Ch. 123.

[4] Ibid. 134.

[5] 28 Ch.D. 205.

It is important to distinguish the motive for making the appointment from the purpose. The motive is irrelevant. If the purpose of this appointment had been to benefit the Claydons, surely Mrs. Sherman would have taken steps to see that Colonel Pardington agreed with her wishes. It is difficult to see how he could be under any sort of suasion and it is submitted that it would be curious if the appointment were held to be bad because Miss Dick survived her sister, but good if she had not so survived, so that Colonel Pardington had become the appointee. I submit that Mrs. Sherman's wishes were too incidental to affect the validity of the appointment to her sister. The test is whether the bona fide intent of the appointor is to benefit the object; not whether he may, or may not, also have intended to benefit a non-object. It may, for example, be that the best way to benefit a person who is an object of the power is to appoint to that person, even though the appointor knows that the fund will go to a third party and that the object will benefit only incidentally.

In *In re Crawshay* [12] the appointment to Jack Crawshay was not intended to benefit him at all and would not have been made but for the appointor's confident belief that he would pass everything he took to her two sons. Here the appointment was to the obvious object, Mrs. Sherman's favourite sister, and would have been made in any case because of the love and affection of the sisters for each other. Equally, on the evidence, Colonel Pardington was the natural and obvious alternative to Miss Dick.

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[6] (1864) 2 De G.J. & S. 205.

[7] [1948] Ch. 123.

[8] (1869) L.R. 5 Ch. 40.

[9] (1859) 4 Dr. 594.

[10] (1890) 43 Ch.D. 615.

[11] [1915] A.C. 372.

[12] [1948] Ch. 123.

In the "death bed" letter of May 16, 1950, Mrs. Sherman modified the wishes she had expressed in the memorandum of 1947. If that letter had been contemporaneous with the appointment the case would have been closer to *In re Crawshay* [12] (though there the suasion was not confined to a letter), for the degree of moral suasion carried by a letter in the circumstances would be considerable, but having regard to the years which had elapsed since the will of 1947, the letter, though admissible evidence, is only a very slight indication as to the state of the appointor's state of mind at the relevant time, that is, when she made the appointment. In that letter she referred to her "last and sincere wish," but that letter was written at a time when her emotions might well have been more to the fore than when she made the appointment by will, and I submit that it is inconsistent with her earlier disposition where she left to the discretion of her sister, merely expressing a wish as to what she would like her sister to do. The letter also is not in line with Miss Dick's evidence that, when they discussed the matter, her sister always emphasized that the provision to be made for the Claydons was entirely a matter for her. There is some indication that Mrs. Sherman altered her wishes from time to time, and it may well be that in the earliest will and memorandum of 1936, which is now missing, she may have appointed her sister without any superadded intention of benefiting the Claydons. Certainly that will was made before she began to discuss the matter with her sister. I submit that that would weaken the suggestion that the appointment which she then made at any rate was not with the primary intention of benefiting her sister.

The onus of showing that an appointment constitutes a fraud on the power is on the person seeking to attack it. A mere suspicion as to the motives of the appointor is not enough, and I submit that, here, the residuary legatees have shown no more, and that the appointment is valid.

Jack Hamawi for the persons entitled on failure of the power. *In re Crawshay* [12] shows that the test for determining whether an appointment is a fraud on the power is, first, whether the appointor had a fraudulent intention at the time of making the appointment, and, secondly, whether she believed that the appointee would feel morally bound to carry out her wishes. If the primary reason in making the appointment was not to benefit the appointee but to defeat the power via the appointee so that the benefit to the appointee, and indeed the choice of that particular appointee, were subordinate matters and the purpose of the appointment was the benefit to the non-object, the appointment is bad. The proportion of the fund given to be retained by the donee is only relevant to the extent that that may provide evidence of the real intention of the appointor, for if the amount which it is desired to give to the non-object is relatively small it is likely that the real intention of the appointment was to benefit the appointee. On the other hand, if a fraudulent intention is proved, the proportion of the fund which is to be diverted from proper objects is not material, for though only a small sum is to go to the non-object, the appointment may, nevertheless, be invalid, since it is a fraud on the power. On the facts here Mrs. Sherman showed a consistent intention over the years from 1938 to 1947 of substantially benefiting the Claydons, and that intention persisted down to the date of her death. In order to give effect to her wishes it would have been necessary to part with a substantial part of the capital and Miss Dick would not have derived any benefit from the appointment, except on paper. If the primary purpose had been to benefit Miss Dick, a mere request added incidentally, not related to the appointment, would not have made the appointment invalid; but that is not what Mrs. Sherman did. The memorandum of wishes was more than a mere request; it was carefully and professionally drafted and was intended to carry weight with Miss Dick.

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[12] [1948] Ch. 123.

[JENKINS L.J. In 1947, when the memorandum was prepared, the solicitors would be advising in the light of *In re Crawshay*,[13] and so far as that case went their advice was right and the steps taken by Mrs. Sherman would have been unobjectionable.]

It is a fraud on a power to use the object of the power as a vehicle for diverting the fund to a non-object. The obvious case of such a fraud is where the appointor makes a bargain with the appointee before making the appointment.

[JENKINS L.J. It is not clear how there can ever be a bargain between an appointor and the appointee in the sense of an enforceable contract; the most that appears to be possible is that the appointor may work on the appointee's conscience using an antecedent promise as a weapon.]

Something short of a bargain will be sufficient to taint the appointment; it will be bad if the appointor believes, when making the appointment, that the appointee will be subjected to such moral suasion that he or she will feel just as much bound to act in a particular way as if he or she had made an actual bargain.

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[13] 43 Ch.D. 615.

[EVERSHED M.R. Mere knowledge of the appointor that the appointee would act in a particular way would not by itself be sufficient to make the appointment bad.]

The knowledge may be evidence of the appointor's intention in making the appointment.

[EVERSHED M.R. Farwell, 3rd ed., p. 474, says that the donee of a limited power may well execute it in favour of an object of the power though he believes or knows that the appointee will at once dispose of the property in favour of non-objects; but that if, besides belief and knowledge of the appointor, there is a bargain between the parties that the appointee shall make a disposition in favour of non-objects, and the evidence shows that the appointment would not have been made but for the bargain, then the appointment will be bad. In support of that proposition he cites *Pryor* v. *Pryor*.[14] That proposition was not referred to in *In re Crawshay*,[15] and, if your contention is correct, *In re Crawshay* [15] seems to have overruled Farwell's statements without referring to them; but if that which the appointor regards as being as good as a bargain is sufficient to constitute a fraud on the power, the statements in Farwell will not be in conflict with *In re Crawshay*.[15]]

In *In re Simpson* [16] Vaisey J. indicated that in the modern cases there was a trend towards a narrowing of the exercise of a power, holding that an appointment not confined to benefiting the appointee would be tainted. It is submitted that *In re Turner* [17] and *Pryor* v. *Pryor* [18] are not in line with this trend.

The appointee here said that she would not feel morally bound to carry out her sister's wishes, but her opinion is not relevant. What matters is the appointor's intention and belief at the time she made the appointment, and the evidence is that she believed that her wishes would be carried out. It is, for example, hardly likely that she would have told the Claydons of her intentions if she had not thought that they were likely to be carried out, and it may well be that she thought Miss Dick might be more likely to carry out her wishes if she found that the Claydons knew that Mrs. Sherman had asked her to make provision for them.

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[14] 2 De G.J. & S. 205.

[15] [1948] Ch. 123.

[16] [1952] Ch. 412.

[17] 28 Ch.D. 205.

[18] 2 De G.J. & S. 205.

Further, Mrs. Sherman would not, it is submitted, have troubled to make all these formal memoranda (involving the need for professional advice and drafting) unless she had thought that they would have some effect, and the only effect which she could have intended them to have must have been to sway the appointee. In fact the memoranda were thinly-disguised testamentary dispositions. The "death bed" letter too was obviously intended to have great weight with her sister, the greater because of the circumstances in which it was written.

Here the degree of suasion was in the opinion of the appointor likely to suffice to sway her sister and that makes the appointment bad.

[EVERSHED M.R. It is difficult to see how the appointor can be said to have thought that the appointee here would necessarily feel morally bound by her wishes, for though the memoranda and the death bed letter were addressed to either Miss Dick or, if she did not survive for the requisite period, to Colonel Pardington, it is not easy on the evidence to see how he could be morally bound, nor how she could believe that he would feel so bound since she had not discussed the provisions with him. Yet it is hardly feasible to hold that the appointment was bad if Miss Dick was the appointee, but good if she died and Colonel Pardington became the appointee.]

If Miss Dick had predeceased her sister, Mrs. Sherman might have taken other steps to subject Colonel Pardington to moral suasion. It is submitted that here there was sufficient moral suasion in the belief of the appointor to bring the case within *In re Crawshay.*[19] *In re Crawshay*[19] was not, however, intended to be an exhaustive exposition of what amounts to a fraud on a power, and, even if the suasion in this case is not found to have been irresistible, it may still have been sufficient to invalidate the appointment. Nor, as was said in the fourth proposition stated by Cohen L.J.[20] in *In re Crawshay*, is it necessary that the appointee should know of the corrupt intention.

In *In re Marsden*[21] the appointee's sense of honour was not played on for, although she was being used as an instrument to divert the funds to the benefit of her father (a non-object), she never knew that the appointor had intended her to act in a particular way—yet the appointment to her was bad. The vital factor is whether the appointor was knowingly using the appointee as a vehicle to defeat the intention of the donor of the power; the

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[19] [1948] Ch. 123.

[20] [1948] Ch. 123, 134.

[21] 4 Dr. 594.

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appointment will be bad if the degree of suasion on the appointee will, to the appointor's knowledge, be such that in the appointor's opinion the certainty that the appointee will act in a particular way is as great as if he or she had made an actual bargain with the appointor.

H. A. Rose for the plaintiff, the trustee of the will of W. B. Dick, deceased.

Evershed M.R. having stated part of the facts set out above continued:—The problem which has been presented to the court is whether the exercise by Mrs. Sherman in her last will of the power of appointment over residue, given in the will of her father, W. B. Dick, in favour of her sister, the appellant Miss Dick, constituted what is known to the courts of equity as a fraud on the power. Wynn-Parry J., after a close review of all the circumstances (and, as must always be the fact, the circumstances were in some respects of a very special character), came to the conclusion that the exercise was a fraud on the power, and, consequently, that the appointment was invalid and ineffectual. Miss Dick has appealed to this court against that decision.

I confess that I have found the case one of most vexing difficulty, and I have been conscious of some vacillation and many doubts during the course of the careful arguments to which we have listened. I have, however, come to the conclusion that I cannot hold that the judge wrongly determined the issue presented to him, and my doubts have been, perhaps, assuaged by the circumstance that my two brethren have felt, perhaps with less nervousness than I, that the conclusion reached is right.

Before I proceed to justify my answer to the problem, let me say that I shall not attempt to make an exhaustive formulation of the principles on which, or the circumstances in which, the court will hold an exercise of a limited power to have been "fraudulent." We have been referred to a recent decision in this court, *In re Crawshay*[1] (the second case of that name involving frauds on a power). Cohen L.J., delivering the reserved judgment of the court,[2] referred to certain propositions which had been accepted by the unsuccessful appellant. "The six propositions are as follows: (1) One case of a fraud

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[1] [1948] Ch. 123; 64 T.L.R. 67; [1948] 1 All E.R. 107.

[2] [1948] Ch. 123, 134.

"on a power is where the donee of a special power of appoint-"ment makes an appointment intended to benefit some person "not an object of the power. (2) To establish a fraud on a "power it is not necessary to prove a bargain between the donee "of the power and the appointee. (3) What the court looks "to is the intention or purpose of the appointor in making the "appointment. (4) It is not necessary that (a) the appointee "should be a party to or know of the corrupt intention or "purpose or (b) that the purpose should in fact take effect. "(5) The relevant date as at which the intention of the "appointor has to be ascertained is the date of the exercise "of the power. (6) Evidence is admissible as to the state of "mind of the appointor, including statements by the appointor "which go to show his or her state of mind at the material "date. Such statements may be material though they are not "contemporaneous with the date of exercise of the power."

It will be observed that some of those six propositions are affirmative in form and some are negative; some are general in scope, some are particular, and indeed procedural. I do not understand that Cohen L.J. intended those six propositions exhaustively to formulate the principles governing frauds on a power or the methods of establishing allegations of frauds on a power. They had been put forward by the respondents and accepted by the appellant for the purposes of the argument; and, in order to make clear what I conceive to be the real scope and limits of those propositions, I will state what the circumstances were that gave rise to the question in *In re Crawshay.*[3] A testator had (as in the present case) disposed of his estate in settled shares among his children, giving in certain circumstances special powers of appointment to the children in favour of other members of his family. One of his daughters, a Mrs. Williams, had married a gentleman of whom the testator disapproved violently, and he, therefore, provided by codicil that the issue of that marriage should in no circumstances be objects of the exercise of the limited powers given. There were in fact two sons of that marriage, named Eliot and Leslie. It was obvious that the whole family regarded this exclusion of Mrs. Williams' issue by that husband (and she was married once only) as being grossly unjust; the recital of the facts makes it plain that the utmost care was taken to see whether the exclusion of the two sons could be circumvented. The advice of eminent counsel was sought as to what should be done to contrive that her share of the corpus of this estate should reach her two boys, Eliot and Leslie; and the questions put to counsel and the advice which he gave (which turned out not to be entirely correct) are set out in the judgment.[4] Acting on that advice, Mrs. Williams proceeded to exercise by will her power of appointment in favour of one of her nephews, Jack Crawshay, who was an object of the power and who was, at the time of the making of the will, about 13 years old. Soon afterwards Jack Crawshay's father made a disposition of his own property; and he clearly brought the greatest possible pressure to bear on Jack to secure that he would transfer anything that he took under the exercise of Mrs. Williams' power of appointment to Eliot and Leslie. And, having regard to the unanimous and strong views taken by all the family, it is not surprising that the boy, out of natural decency and filial piety, ultimately did what was expected of him. After the disposition by Jack's father had been made, Mrs. Williams executed a new will containing a similar appointment in favour of Jack Crawshay and accompanied it by this letter addressed to the boy: "My dear Jack, you "will not I am sure misunderstand what I have done with "regard to the disposition of money in my will. It is scarcely "to be imagined that any question will arise that would possibly "deprive your cousins Eliot and Leslie of their just inheritance, "and I have only exercised my power of appointment under "your grandfather's will in case by any possibility any difficulty "should arise, and must in that event trust to your honour that "reparation should be made. In case you may not know, it was "decided by your father's and uncle's lawyers, that in con"sequence of the codicil to your grandfather's will, the £100,000 "he left to me came to them at my death, and they were "honourable, kind, and just enough, to give up all right to it; "so that there can hardly be any question of claim on the part "of anyone in the matter, except the rightful inheritors, Eliot "and Leslie. I have not, dear Jack, as yet seen very much of "you; before this letter reaches you we may be better acquainted. "In any case I trust the transaction may not cause you any "trouble or bother and that these few words from one then no "longer here, may not impose a very painful duty, and that "you will not regard unkindly Your affectionate aunt, Rose "Williams."

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[3] [1948] Ch. 123.

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[4] [1948] Ch. 123, 138.

C. A.
1953

DICK,
In re.
KNIGHT
v.
DICK.

Evershed M.R.

Cohen L.J. stated [5] that the propositions which he enunciated were derived from certain observations of P. O. Lawrence J. in *In re Wright*,[6] and he said: " We respectfully agree with those " observations. We would add that the second proposition "— that is, that to establish a fraud it is not necessary to prove a bargain—" is founded on the observations of Lord Parker of " Waddington in the Privy Council in *Vatcher* v. *Paull*,[7] which " were cited by Vaisey J. in the court below, namely: ' A bargain " ' is not essential. It is enough that the appointor's purpose " ' and intention is to secure a benefit for himself or some other " ' person not an object of the power.' A difficulty, however, " arises in determining what, short of a bargain, establishes such " purpose and intention. On the one hand, if the appointor " appoints to an object of the power, hoping that the appointee " will so dispose of the appointed property as to benefit a non- " object, but intending to benefit the object whatever disposition " he may make of the appointed property, the appointment will " be valid. But if he makes the appointment to an object with " the belief that the object will be subject to strong moral " suasion to benefit a non-object, which suasion the object would, " in the appointor's opinion, be unable to resist, the appointment " would, we think, be invalid as a fraud on the power."

Counsel for the appellant has submitted that that antithesis embraces all possible cases short of a bargain and, in consequence, that unless it is shown by proper proof (the onus, it has been conceded, lying on him who challenges the validity of the exercise of the power) that the object of the power in whose favour it was exercised is " subject to strong moral suasion to " benefit a non-object, which suasion the object would, in the " appointor's opinion, be unable to resist," then the case must fall within the first alternative and be regarded as being no more than a hope or expectation, subject to an overriding intention of benefiting, or benefiting primarily, the object of the power. In other words, it is submitted that unless a moral suasion of the character indicated is proved, the appointment must be good.

I do not think that that is a just interpretation of this passage in the judgment of Cohen L.J. He was stating the propositions in order to found his judgment on the facts of *In re Crawshay*,[8] and on those facts it is perhaps not entirely surprising that the court came to the conclusion that, though Jack Crawshay had never made any sort of bargain or any kind of promise, he was under a moral suasion so strong that in Rose Williams' opinion he could not be expected to have resisted. I think the more general rule which should guide the court was stated by Lord Parker of Waddington and was quoted by Cohen L.J.[9]: "'It is enough that the appointor's purpose and intention is to "'secure a benefit for himself or some other person not an "'object of the power'." I should not wish to be thought to lay down that whenever there is any intention, however secreted in the bosom of the appointor, to benefit some non-object in some measure, that therefore the exercise of the power is bad. After all, although the phrase "fraud on the power" does not carry the sense of deceit which the word "fraud" bears in other contexts, it indicates the doing of something which is not right, using those words in their broad sense—at least, a deliberate defeating of what the donor of the power authorized and intended. To take an example which has been discussed during the argument: if A, having no free estate but having a limited power of appointment, exercises that power in favour of some object to whom he has natural inclinations of affection, and says to that person, either by contemporaneous document or otherwise, "I "am in this difficulty, that I have no free estate, and I therefore "hope that you will find it in your heart to look after the persons "to whom I feel a natural obligation"; and, if he not only says that, but thinks that the object will be sensible of those claims, I should not wish it to be thought that I was holding that such an appointment, made in such circumstances, must be invalid. But refinements of that kind are not necessary, in my judgment, for consideration in the present case; for if (to go to the other end of the scale) the proper inference from all the facts is that what the appointor has deliberately set out to achieve, by means of the appointment he has made, is the benefiting of some non-object, then, as it seems to me, the appointment falls within the disability expressed by Lord Parker; and, as I have already indicated, on the whole I am not prepared to say that Wynn-Parry J. was wrong in reaching that result in the present case.

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[5] [1948] Ch. 123, 135.
[6] [1920] 1 Ch. 108, 117.
[7] [1915] A.C. 372, 378.
[8] [1948] Ch. 123.

I shall presently indicate the difficulties, but I must first of all once more return to the narrative. This lady, Mrs. Sherman, was (to use the judge's own expression) from a testamentary point of view active during many years towards the end of her life. [His Lordship stated the facts as to the testamentary activities of Mrs. Sherman set out above, commenting that as regards the earliest will of which there was any record, Mr. Rink had sought to make a point out of the fact that the terms of that will, made in 1936, and of a contemporaneous memorandum were unknown, but that he (his Lordship) had been unable to grasp the point. In concluding the facts he referred to the letter written by Mrs. Sherman on May 16, 1950 (the " death bed " letter) and said:] I have in mind what Mr. Rink pointed out and what Cohen L.J. said, that intention at the date of the appointment is the vital thing but that evidence may be received, not contemporaneous with that appointment, in so far as it throws light on the state of the appointor's mind at the date of the appointment. This document that I am about to read was signed three years after the appointment. It was written by her a fortnight before her death. [His Lordship read the letter, and continued:] Now if the matter stood there alone on these memoranda and this letter, it would, I think, be difficult (though the letter admittedly throws into some obscurity the precise wishes of Mrs. Sherman) to resist the conclusion that she, Mrs. Sherman, intended and purposed that out of the subject-matter of the appointment very substantial benefits should go to the Claydons; and she expressed, at any rate in 1950, the clear view that she knew that Miss Dick and Colonel Pardington could be trusted to do what she wanted.

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[9] [1948] Ch. 123, 135.

But there is material pointing the other way, and it is this matter upon which, for myself, I have found difficulty. A number of affidavits were filed by or on behalf of the appellant, including one by Miss Dick. There was no cross-examination upon any of these affidavits. Mr. Hamawi said that he must take the responsibility of not having sought any adjournment in order to cross-examine the deponents and, in the result, he was content to accept, and I think he had to accept, and Wynn-Parry J. accepted, the sworn statements of these deponents as truthful. It is obvious that some of the language used raises doubts whether what was said in the affidavits is consistent with any inference which can sensibly be drawn in the circumstances. But, after all, Miss Dick was over 81 years old when she made her affidavit. It is possible that her recollection is not entirely accurate; and it is certain that the form of language she swore to was carefully prepared—though I am not thereby suggesting for a moment that she did not read it and conscientiously take her oath.

[His Lordship read the relevant parts of the affidavit sworn by Miss Dick, which are set out above, and went on:] I find it difficult to suppose (without making any imputation against the perfect good faith of Miss Dick) that Mrs. Sherman could have made the sort of statement that apparently she did make to Mr. and Mrs. Claydon if she had not told Miss Dick about the provision suggested for capital transfer or the £800 per annum free of tax. Miss Dick has said on oath, and plainly said, that she is certain that Mrs. Sherman would not have expected her (Miss Dick) to feel under a binding moral obligation to give effect to what she (Mrs. Sherman) had suggested.

It should be said (and it was proved) that Colonel Pardington was a natural alternative choice for Mrs. Sherman to make if her nearest sister, Miss Dick, should not survive; for as compared with the rest of the family, Colonel Pardington and his wife and children seem (after Miss Dick) to have been closest to Mrs. Sherman. But there is no suggestion in the evidence that Mrs. Sherman ever indulged in any discussions with Colonel Pardington which were in the least comparable with those which she had had with Miss Dick.

[His Lordship read the affidavit of Colonel Pardington, set out above, and continued:] One final matter of fact I should mention, and it is this. After death duties have taken their toll it appears that the amount left of the corpus of the share appointed is in the region of £35,000—reduced by death duties from something nearly double that amount. Of course, it cannot be assumed that Miss Dick or Mrs. Sherman closely watched the rate of duties, which in fact increased after the will and before her death. An estimate has been made, which counsel on both sides have accepted, that the capital sum required to produce £800 per annum free of income tax would be about £22,000 at 4 per cent. I do not wish to be thought to adhere closely to those figures, but I mention them because it is plain that the wishes of Mrs. Sherman did not merely involve making some eleemosynary payment out of income to old and faithful servants or ex-servants but did involve (if given effect to) a payment out, a transfer, of a very substantial proportion of the capital of the fund appointed. Mrs. Sherman had obviously become very much attached to the Claydons. Mr. Claydon began serving her as a gardener-handyman, but the association became closer, and during the last two years of her life Mrs. Sherman was living with the Claydons in the Claydons' house. I venture to repeat the reference to that part of the will including the gift of residue which showed a strong desire on Mrs. Sherman's part to bestow benefits of very substantial value, whenever and wherever possible, upon the Claydons. I am not suggesting that there was any kind of impropriety in her wishing so to do. She no doubt owed a great deal to the Claydons; and if the property was free for her to dispose of, she was perfectly entitled to give it to those whom she regarded as most deserving, or at any rate to those whom she desired most to benefit.

But the question is, as I have already indicated, when all these matters are borne in mind, whether the right inference is that what Mrs. Sherman intended to do, her real, deliberate purpose which she wanted and set out by all means that were possible to achieve, was to benefit the Claydons via her relations (Miss Dick or Colonel Pardington), or whether her purpose was really to benefit her relations subject only to this, that she had indicated to them that she hoped (and, if you like, hoped with confidence) that they would do something for the Claydons on the lines she had suggested. I have come to the conclusion that this case falls within the former of the two alternatives. I think that Mr. Rink was at least justified in saying that, if the real test was whether the case was proved by Mr. Hamawi to be in pari materia with *In re Crawshay* [10] it may be that he would not succeed: it may well be that it is not shown on the evidence that Miss Dick, still less Colonel Pardington, was, in the view of the appointor, Mrs. Sherman, subject to a moral suasion so strong that to them it would be irresistible. But, as I have said, I do not think that is an exhaustive formulation—short of a bargain; if indeed, as my brother Jenkins pointed out, there really can be a bargain in these cases—of the circumstance where an exercise of the power is held to be a fraud on it. I take as my test Lord Parker's statement,[11] and I have only added for the purposes of this case that I am assuming the question is whether the intention, the purpose, to be sought is a deliberate intention, a deliberate attempt, to achieve a particular end.

Against that view I think it might fairly be said that there are three formidable arguments. First, it is undoubtedly true (and Mr. Rink rightly put this at the forefront of his submission) that Miss Dick was the obvious and natural object of Mrs. Sherman's bounty. They were sisters; they had been closely associated, and lived together for years; and if Mrs. Sherman had to make provision in the event of Miss Dick not surviving to enjoy the portion, then, equally, Colonel Pardington was the natural and obvious alternative.

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[10] [1948] Ch. 123.

[11] [1915] A.C. 372, 378.

In the course of the argument my brother Jenkins drew attention to the case where a man leaves property in his will to A. and B. with a statement that he trusts them to give effect to certain wishes which have already been expressed. Everybody knows that that is a way of achieving indirectly a gift to objects whom for one reason or another it is not desirable to mention on the face of the will. My brother, further, made this forceful observation, that if this appointment had taken effect and if Miss Dick had done what Mrs. Sherman wished and transferred £22,500 to Mr. Claydon and had been asked by a relative: " Why have you " done that?", she would, if she gave an honest answer, have had to say something to this effect: " Well, I have discussed " this many times with my sister. She appointed this fund to " me, but it was her intention, and she made that clear to me, " that I should, out of what I got, make this transfer to Mr. " Claydon, and in honour I could do no other "—exactly the sort of answer that A. and B. would have given in the supposed case if a member of the family had asked what had become of the large sum of money as to which A. and B., apparently, were beneficiaries. There is, however, this distinction between the two cases. If a gift is made to A. and B. it seems not unlikely that they were selected as trustees from the fact that they are jointly-named beneficiaries; whereas here, as I have said, the appointee on her own merits was the obvious choice for Mrs. Sherman to make.

What I have said about Colonel Pardington as being the natural alternative leads to the second point, which is, it seems to me, of great force also. We are not here dealing only with an appointment to Miss Dick. The last will provided for the alternative of Colonel Pardington taking the share; and it is obvious that many of the inferences about Miss Dick and what passed between Mrs. Sherman and her sister cannot apply with any force to Colonel Pardington, for there is no evidence that he was ever a party to a discussion about the Claydons. Indeed, there is no evidence of his being under any moral obligation to do anything for the Claydons, apart from what he may have derived from reading the memoranda when he saw them for the first time after his aunt's death.

Third, there is the uncontradicted evidence of Miss Dick herself and of the other witnesses which, in the absence of cross-examination, must be accepted, and has been accepted by Mr. Hamawi, as truthful evidence. I think those three points are very formidable.

Against them on the other side, there are also three points. First, regard must, I think, be had to the persistence with which Mrs. Sherman, over a period of years, made wills and contemporaneous memoranda setting out in precise form exactly what she intended; to the trouble which she took to go to the solicitors and get advice, and to the long period of discussion of the matter with her sister—coupled, of course, with the obvious and growing attachment that she had for the Claydons, and with her attempts in other respects, wherever possible, to confer benefits upon them. Second, and arising from the first, there is the part played in the matter by the solicitor, who obviously drafted these memoranda and advised her about them. There is, indeed, a letter written early in 1943, from which it appears that Mrs. Sherman had particularly asked to be assured that she had succeeded in conferring upon Miss Dick by her will the power to dispose of the corpus. What is the inference to be drawn from these facts and these consultations? If Mrs. Sherman was merely intending to point out to her sister that she could not, herself, do what she would like to do for the Claydons and that she hoped and trusted that Miss Dick could do it for her, then what was the point of all this elaborate preparation of memoranda and why was she so anxious to know that Miss Dick could transfer or transpose the capital? It seems to me that the inference inevitably is that what she was wanting to know was: "How can I most nearly achieve "what you have told me is strictly impossible, namely, the use "of this power of appointment to confer large benefits upon the "Claydons?" Third, there is the extent of the benefit. Reverting again to the example to which I have twice alluded, if the appointee is told: "Well, I hope and trust you will do "what I feel under an obligation to do if I could for those who "have served me: I leave it, of course, to you," you are thinking of benefactions which are of an altogether different order from those expressly mentioned in Mrs. Sherman's memoranda, which involve, as I have said, a capitalization of £22,500—two-thirds of the whole fund.

Weighing the three points last mentioned (which seem to me to indicate a conclusion against the validity of the appointment) against the three former matters which tend in the other direction, I think that Wynn-Parry J. was justified in allowing the former to outweigh the latter. I confess, finally, that I am not entirely uninfluenced by this: that if we were to hold in this case that this was an effective appointment which involved no fraud upon the power, it would, I suppose, become a model in other cases. Wills would be accompanied by statements of this kind and, unless it were proved that the appointee was (within the language used in *In re Crawshay*[12]) under a moral suasion so strong that in the opinion of the appointor it was irresistible, then a person who had, by the bounty of another, a limited power to dispose of that other's property, could, by such device, contrive to defeat the intention of the original donor and secure the enjoyment of the donor's property, or a substantial part of it, by persons who were altogether outside the ambit of the intended benefaction.

For these reasons I conclude that this appeal fails and should be dismissed.

JENKINS L.J. I agree, and find nothing that I can usefully add to what my Lord has said.

MORRIS L.J. I agree.

Appeal dismissed with costs. Respondent plaintiff's costs as between solicitor and client out of the fund. Appellant to pay all other respondents' costs as between party and party. Leave to appeal to the House of Lords refused.

Solicitors: *Montagu's & Cox & Cardale for Snell & Co., Tunbridge Wells; Hardcastle Sanders & Armitage.*

E. D.

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[12] [1948] Ch. 123.

In re BASIOLI, DECD.
McGAHEY *v.* DEPAOLI AND OTHERS.

1953
Jan. 14, 15.

Upjohn J.

[1952 B. No. 3136.]

Will—Devise and bequest of freehold property and of effects and of residuary estate equally between children of testatrix—Testatrix predeceased by daughter dying intestate and leaving son surviving testatrix but dying under 21 *and unmarried—Devises and bequests to daughter not to lapse but to fall into and devolve with daughter's estate—Persons interested in those devises and bequests on daughter's intestacy to be ascertained as at date of daughter's death—Wills Act,* 1837 (7 *Will.* 4 *and* 1 *Vict., c.* 26), *s.* 33.

Section 33 of the Wills Act, 1837, provides that, where real or personal estate is devised or bequeathed to a child or other issue of the testator for an estate or interest not determinable at or before the death of that child or issue, and that child or issue predeceases the testator leaving issue who survive the testator "such devise or bequest shall not lapse, but shall take effect as "if the death of such person had happened immediately after "the death of the testator, unless a contrary intention shall "appear by the will."

A testatrix by her will made in 1923 left certain property to her children. In 1929 one of her daughters died intestate survived by a son; in 1937 the testatrix's husband died; in 1939 the deceased daughter's husband died, also intestate; in 1940 the testatrix died; and in 1949 the deceased daughter's son died under 21 years of age and unmarried.

The administrator of the deceased daughter and of her husband took out a summons to determine, in effect, whether the persons entitled, on her intestacy, to the assets and interests expressed to be given to her by the testatrix's will were to be ascertained as at the date of her death in 1929 or as though she had survived the testatrix and died immediately after her in 1940:—

Held, (1) that section 33 was aimed solely at preserving the gift in the parent's will and was not concerned to alter the administration of the predeceasing child's estate, the words "but "shall take effect as if the death of such person had happened "immediately after the death of the testator" having been put into the section solely to explain and amplify the immediately preceding words "such devise or bequest shall not lapse . . ."; (2) that, accordingly, the persons interested on the daughter's intestacy were to be ascertained as at the date of her death in 1929.

In re Hensler, decd. (1881) 19 Ch.D. 612 and *In re Hurd* [1941] Ch. 196; 57 T.L.R. 287; [1941] 1 All E.R. 238, followed.

Dicta of Kindersley V.-C. in *Pearce* v. *Graham* (1863) 32 L.J. Ch. 359, 360 and observations of Stirling L.J. in *In re Scott* [1901]

1953

Basioli, decd., *In re.* McGahey v. Depaoli.

1 K.B. 228, 239; 17 T.L.R. 148 and of Jessel M.R. in *Pickersgill* v. *Rodger* (1876) 5 Ch.D. 163, 172 applied.

In the Goods of Mary Councell (1871) L.R. 2 P. & M. 314 and *In re Allen's Trusts* [1909] W.N. 181 not followed.

ADJOURNED SUMMONS.

By her will dated May 17, 1923, Maria Dominica Depaoli (hereinafter called " the testatrix ") provided " . . I give devise " and bequeath my freehold dwelling-house . . . with the . . . " household effects therein belonging to me . . . unto my three " daughters in equal shares for the purpose of forming a home " for them until marriage and in the event of either [sic] of my " said daughters marrying I direct that the remaining unmarried " daughters or daughter as the case may be shall have the option " if desired of purchasing the share of my daughter or daughters " so marrying in the said house and furniture and effects therein " at a price to be ascertained by valuation in the usual manner " I give devise and bequeath my freehold property [naming it] " . . . together with the business . . . now carried on by me " thereon and all effects belonging to me in connexion with the " said business unto and equally between my son and my three " daughters I give devise and bequeath all the rest residue and " remainder of my property . . . unto my trustees upon trust " to sell call in and convert the same into money and subject to " the payment thereout of my funeral and testamentary expenses " and debts upon trust to pay thereout the following legacies " namely [setting them out] and upon trust to divide the residue " of such moneys equally between my four children."

The testatrix's daughter Adelina Emilia Basioli (hereinafter called " Mrs. Basioli ") died intestate on July 24, 1929, survived by her husband and by their only child, a son. On November 26, 1937, the testatrix's husband died. On November 2, 1939, Mrs. Basioli's husband died, also intestate. On February 11, 1940, the testatrix died, and on September 12, 1949, the son of Mr. and Mrs. Basioli died an infant and a bachelor.

Accordingly, by this summons, which was taken out on June 19, 1952, and to which Mrs. Basioli's brother and sisters were defendants, the administrator of Mr. and Mrs. Basioli asked, inter alia, whether, on the true construction of the testatrix's will and in the events which had happened, on the deaths of Mr. and Mrs. Basioli before that of the testatrix the assets and interests expressed by the testatrix's will to be given to Mrs. Basioli devolved, under Mrs. Basioli's intestacy, on the persons entitled under the Administration of Estates Act, 1925, ascertained at Mrs. Basioli's death, to Mrs. Basioli's own estate, so that Mr. Basioli's estate was entitled thereout to a first charge of £1,000 with interest from Mrs. Basioli's death at 5 per cent. per annum so far as he did not receive that sum out of Mrs. Basioli's own estate, and subject thereto Mrs. Basioli's parents were entitled: or whether, so far as concerned those assets and interests, the persons entitled under Mrs. Basioli's intestacy ought to be ascertained on the footing that Mrs. Basioli survived, and died immediately after, the testatrix.

Wilfrid M. Hunt for the plaintiff. The question depends on the true construction of the will and of section 33 of the Wills Act, 1837.[1] There are two views on the true construction of that section. The first is that its only purpose is to prevent the gift in the will from lapsing and that it is not meant to affect the administration of the estate of the recipient of the gift by imputing to that recipient an artificial date of death. The other view is that the section goes much further than that and that the words "shall take effect as if the death of such person had happened "immediately after the death of the testator" make it necessary to treat the predeceasing child as having survived the testator not merely to prevent lapse but for all purposes in relation to the gift. If, as the plaintiff contends, the first view is correct, Mrs. Basioli's parents are entitled to the assets and interests expressed by the testatrix's will to be given to Mrs. Basioli, subject to the right of Mr. Basioli's estate to a first charge of £1,000 with interest at 5 per cent. per annum so far as he did not receive it out of Mrs. Basioli's estate: if, as the defendants contend, the second view is correct, and Mrs. Basioli is to be treated for the purposes of those assets and interests as having died immediately after the testatrix in 1940, the defendants are entitled. In *In re Hurd*[2] Farwell J. held that section 33 applied only to prevent lapse and that it did not alter the way in which the estate of the person predeceasing the testator was administered, but simply increased that estate and did not alter the persons entitled to it under the law in force at the death of the person predeceasing the testator. It is remarkable that in that case not a single authority was cited, for there are quite a number. Farwell J.'s decision is supported by the decision in one of them, namely, *In re Hensler, decd.*,[3] by dicta of Kindersley V.-C. in *Pearce* v. *Graham*,[4] and by observations in two others, namely, those of Stirling L.J. in *In re Scott*[5] and those of Jessel M.R. in *Pickersgill* v. *Rodger*.[6] Two decisions are against that in *In re Hurd*,[7] namely, *In the Goods of Mary Councell*[8] and *In re Allen's Trusts*.[9] In *Pearce* v. *Graham*[10] a testator by a will later than the Wills Act left a legacy to a married daughter who predeceased him and her husband and was survived also by issue, and in whose marriage settlement was a covenant to settle all property coming during the coverture to her or to her husband in her right; and it was held that the legacy was not bound by the settlement because, notwithstanding the fictitious survivorship created by section 33 to prevent lapse, it was not acquired during the coverture within the meaning of the covenant. True, Pearson J., in *In re Hone's Trusts*,[11] treated Kindersley V.-C.'s statement, in *Pearce* v. *Graham*,[12] of the effect of section 33 as being obiter: but Kindersley V.-C.'s indication of his view of the section clearly justify citing his observations as supporting *In re Hurd*.[13] In *In re Hensler, decd.*,[14] where a father left a freehold to a son who predeceased the father having by his will devised all his real estate to the father and leaving issue living at his father's death, it was held that under the father's will the property passed absolutely to the son and became subject to testamentary disposition by him because under section 33 he must be deemed to have survived the father; but that as he left it to his father, the gift by him (the son) failed; "for," said Hall V.-C.,[15] "I cannot "hold that the section ought to be extended to any case beyond "the one expressly provided for. It must therefore be declared "that John Hensler the son took the property but died intestate "as to it, and that the petitioner is entitled as his heir-at-law."

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[1] Wills Act, 1837, s. 33: " . . . "Where any person being a child or "other issue of the testator to whom "any real or personal estate shall be "devised or bequeathed for any "estate or interest not determinable "at or before the death of such "person shall die in the lifetime of "the testator leaving issue, and any "such issue of such person shall be "living at the time of the death of "the testator, such devise or bequest "shall not lapse, but shall take effect "as if the death of such person had "happened immediately after the "death of the testator, unless a "contrary intention shall appear by "the will."

[2] [1941] Ch. 196; 57 T.L.R. 287; [1941] 1 All E.R. 238.

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[3] (1881) 19 Ch.D. 612.

[4] (1863) 32 L.J.Ch. 359, 360.

[5] [1901] 1 K.B. 228; 17 T.L.R. 148.

[6] (1876) 5 Ch.D. 163.

[7] [1941] Ch. 196.

[8] (1871) 2 P. & M. 314.

[9] [1909] W.N. 181.

[10] 32 L.J.Ch. 359.

[11] (1883) 22 Ch.D. 663.

[12] 32 L.J.Ch. 359, 360.

[13] [1941] Ch. 196.

[14] 19 Ch.D. 612.

[15] Ibid. 615.

Immediately before that, however, Hall V.-C. said[16]: "Effect "would have been given to the will of the son in case he had "left his property to someone other than his father and who in "fact survived him, yet as he left it to his father the gift by the "son fails. . . ." Those words show that this case also supports the plaintiff's contention, as also does *In re Scott*,[17] where Stirling L.J. says of section 33[18]: "The legislature has simply "provided that in certain cases there shall be a posthumous "addition to the property of a deceased person, the object of "such provision being to place that additional property at the "disposal of the deceased while still living. At this point, in "my judgment, the operation of the Wills Act ceases; and this "additional property is left to go and devolve as part of the "property of the deceased child"; and in *Pickersgill* v. *Rodger*[19] Jessel M.R. says that the child dying in the testatrix's lifetime in the case before him "has his estate augmented by the devise "or bequest made to him by the testatrix. . . ." True, *In the Goods of Mary Councell*[20] and *In re Allen's Trusts*[21] do not support the contention of the plaintiff in the present case. The court, however, ought to disregard both those decisions, for in *In the Goods of Mary Councell*[22] *Pearce* v. *Graham*[23] was not cited and the point was not argued before Lord Penzance (who, moreover, did not formally deliver judgment) and *In re Allen's Trusts*[24] did no more than follow *In the Goods of Mary Councell*[25]; and neither of those two cases was cited in *In re Hurd*[26] and both of them are inconsistent with the ratio decidendi in that case: see Jarman on Wills, 8th ed. (1951), Vol. 1, at p. 468; Theobald on Wills, 10th ed. (1947), at p. 560. Accordingly the court ought to hold that the persons interested on Mrs. Basioli's intestacy are to be ascertained as at the date of her death in 1929.

T. A. C. Burgess for the defendants. Both views of the true construction of section 33 have been discussed extensively and in detail in an article entitled "Section 33 of the Wills Act, 1837," published in 91 Law Journal Newspaper (1941) at p. 252. The writer of the article has called the first (i.e., the view that the sole object is to prevent lapse) the "narrow" view and the second the "wide" view. Whether *In re Hensler, decd.*[27] supports the narrow or the wide view appears uncertain. The writer of the article is of the opinion that the view of Hall V.-C. "that the "object and the purpose of the 33rd section was to effectuate the "will of the father, and that that object and purpose are satisfied "by holding that the son took the estate"[28] clearly support the narrow view. He goes on to say, however, that "the actual "decision was that, although section 33 preserved the father's "gift to the son, the son's gift lapsed because by presumption "of law the father died first," and he observes that "the fact "that this was a remarkable judicial somersault seems to have "attracted little attention and *In re Hensler*[29] appears to have "been generally accepted as establishing a rule in accordance "with the actual decision. The wide view thus obtained a "foothold in the Chancery Division." With regard to other authorities, neither *In the Goods of Mary Councell*[30] nor *In re Allen's Trusts*[31] seem to be doubted in the section on wills, written by the late Mr. J. M. Lightwood, in Halsbury's Laws of England, 2nd ed., Vol. 34, at p. 140. *In re Hurd*[32] is the subject-matter of the final words of the article in the Law Journal Newspaper. The writer describes that decision as being satisfactory "in that it is sound in principle and it contains a "judgment in which the problem is considered at some length." He then expresses the view that the fact that none of the earlier authorities were cited deprives the decision of much of its weight, and that what is needed is a decision of the Court of Appeal in which, the writer observes, "it is to be hoped that that tribunal "will follow *In re Hurd*[33] rather than the earlier cases." With that decision still to seek, however, and in view of the fact that *In the Goods of Mary Councell*[34] and *In re Allen's Trusts*,[35] though disapproved in Jarman on Wills and Theobald on Wills, are not so in Halsbury's Laws of England, the court can and, it is submitted ought to, hold that the persons interested on Mrs. Basioli's intestacy are to be ascertained as though she had survived the testatrix and died immediately after her in 1940, i.e., that those persons are the defendants.

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[16] 19 Ch.D. 612, 615.
[17] [1901] 1 K.B. 228.
[18] Ibid. 239.
[19] 5 Ch.D. 163, 172.
[20] L.R. 2 P. & M. 314.
[21] [1909] W.N. 181.
[22] L.R. 2 P. & M. 314.
[23] 32 L.J.Ch. 359.
[24] [1909] W.N. 181.
[25] L.R. 2 P. & M. 314.
[26] [1941] Ch. 196.

Wilfrid M. Hunt in reply. If the court is going to be influenced by the fact that none of the earlier authorities were cited to Farwell J. in *In re Hurd*,[36] it must consider also what could have happened if they had all been cited to him. It is highly probable that he would have come to exactly the same decision as he did. In *In re Hone's Trusts*[37] counsel cited Kindersley V.-C.'s statement in *Pearce* v. *Graham*[38] of the effect of section 33 on which reliance is placed for the plaintiff in the present case, and Pearson J. did not suggest that that statement was wrong. In *In re Hensler, decd.*[39] Hall V.-C. stated the principle in the same way when he said: "Effect would have "been given to the will of the son in case he had left his "property to someone other than his father and who in fact "survived him," and Farwell J. might surely have accepted all three decisions as supporting the conclusion to which he came. For these further reasons and—since the article in the Law Journal Newspaper has been cited in argument for the defendants —in view of the final paragraph of that article, the court ought to declare that the persons interested in Mrs. Basioli's estate are to be ascertained as at the date of her death in 1929.

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[27] 19 Ch.D. 612.

[28] Ibid. 615.

[29] 19 Ch.D. 612.

[30] L.R. 2 P. & M. 314.

[31] [1909] W.N. 181.

[32] [1941] Ch. 196.

[33] [1941] Ch. 196.

[34] L.R. 2 P. & M. 314.

[35] [1909] W.N. 181.

UPJOHN J., after stating the facts, continued: The sole question which I have to determine is whether the persons entitled to the property devised and bequeathed to Mrs. Basioli by her mother ought on her intestacy to be ascertained as at the date of her death in 1929 or whether they should be ascertained as though Mrs. Basioli had survived her mother, the testatrix, and died immediately thereafter, in 1940. As Mrs. Basioli's son failed to attain the age of 21 years, if the former is the true view, the persons entitled to the estate of Mrs. Basioli are the plaintiff, as the personal representative of Mr. Basioli, who will take the lion's share of the estate, representing the right of the surviving spouse to £1,000 and interest thereon and half the income of the estate during his life; and the estates of Mrs. Basioli's parents, the testatrix and her husband, are also interested, and they will take the balance in equal shares. In the latter case, that is to say, if Mrs. Basioli is treated as having died in 1940, the defendants, i.e., her two sisters and her brother, are entitled on her intestacy. It is a question of construction of section 33 of the Wills Act, 1837.

[His Lordship read the section and continued:] Two views as to the true construction of that section have been expressed. One view, which has been called the narrow view, is that the sole object of the section is to give effect to the gift in the testator's will and to prevent lapse, and that the section was not intended to affect or alter the administration of the estate of the person receiving the gift by imputing to that person an artificial date of his or her death. The alternative view as to the true construction of the section has been referred to as the wide view, and is that the predeceasing child of the testator must be treated, for all purposes in relation to the testator's gift, as surviving the testator.

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[36] [1941] Ch. 196.

[37] 22 Ch.D. 663, 664.

[38] 32 L.J.Ch. 359, 360.

[39] 19 Ch.D. 612, 615.

Authorities are to be found in support of both of those views, and I must therefore review them. In support of the narrow view, the first authority is *Pearce* v. *Graham*,[1] a decision of Kindersley V.-C. The headnote reads: "A testator, "by his will, dated since the Wills Act, gave a legacy to his "daughter, a married woman, who predeceased him, leaving "issue, and also her husband, her surviving. The settlement "made on her marriage contained a covenant that all property "coming to her or to her husband in her right during the "coverture should be settled:—Held, that notwithstanding the "fictitious survivorship created by section 33 of the Wills Act, "for the purpose of preventing a lapse, the legacy was not "acquired during the coverture within the meaning of the "covenant, and was therefore not bound by the settlement."

In the course of his judgment Kindersley V.-C. said[2]: "The "property left to Mrs. Pearce according to the words of the "covenant, must 'come to or be vested in' her during the cover-"ture; and therefore it is clear that if it did not 'come to or "'become vested in' her during the coverture, it is not subject "to the trusts of the settlement. It must be admitted, at the "outset, that the legacy would be subject to the debts or "contracts of the legatee, and be assets for that purpose; but "for the purposes of the covenant, my opinion is that it did not "come to or become vested in her whilst the coverture lasted. "The effect of the 33rd section of the Wills Act was simply to "prolong her life by a fiction for a particular purpose, namely, "that the legacy might not lapse, but certainly not for any other "purpose; whereas the covenant applies to the actual coverture; "and even therefore if the act had prolonged the coverture, it "would have been a fictitious one only, and not an actual one "within the terms of the covenant. The plaintiff is therefore "entitled to a decree." Those remarks as to the effect of section 33 are, I think, obiter, and were so treated by Pearson J.

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[1] (1863) 32 L.J.Ch. 359.

[2] Ibid. 360.

in *In re Hone's Trusts*,[3] which I shall have to mention later; but, nevertheless, the Vice-Chancellor expressed a clear view as to the ambit of the section, which is in favour of the narrow view.

The next authority which, in my judgment, on a careful examination supports the narrow view, is *In re Hensler, decd.*[4] The headnote reads: "A father by his will devised a "freehold house to a son, and his residuary real estate to "trustees in trust for other persons. The son died in his "father's lifetime leaving issue living at his father's death, and "having by his will devised all his real estate to his father:— "Held, that as, under the 33rd section of the Wills Act, the "son must be deemed to have survived the father, the property "passed to the son absolutely under his father's will, and became "subject to testamentary disposition by the son: But that as by "the will of the son the property was devised to his father, the "devise by the son failed, and his heir-at-law was entitled to "the property." The judgment of Hall V.-C. is quite short, and I will read the whole of it[5]: "By virtue of the 33rd section "of the Wills Act, the property passed under the devise in the "father's will as if the devisee had died immediately after the "death of his father. The effect of that is that I must consider "the son to have survived his father and to have taken as "devisee. I must also consider that the property became subject "to the son's will, and included in the general gift therein "contained. The son must be deemed to have had the property; "and then the question arises whether he must by a legal fiction "be taken to have survived his father for all purposes, or to "have survived him only for the purpose of giving effect to the "gift of the father. It seems to me that the object and "the purpose of the 33rd section was to effectuate the will of the "father, and that that object and purpose are satisfied by holding "that the son took the estate. Effect would have been given to "the will of the son in case he had left his property to someone "other than his father and who in fact survived him, yet as he "left it to his father the gift by the son fails, for I cannot "hold that the section ought to be extended to any case beyond "the one expressly provided for. It must therefore be declared "that John Hensler the son took the property but died intestate "as to it, and that the petitioner is entitled as his heir-at-law."

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[3] (1883) 22 Ch.D. 663.

[4] (1881) 19 Ch.D. 612.

[5] Ibid. 614.

I confess that I have some difficulty in following the grounds of the actual decision in that case, and I am not alone in that difficulty (see an article entitled " Section 33 of the Wills Act, 1837," in the Law Journal Newspaper for 1941, at p. 252). The author of that article, however, treats *In re Hensler, decd.*,[6] as supporting, on the whole, the wide view. In that, in my judgment, the learned author was wrong. I think that it is clear from the judgment that Hall V.-C. would have held that a gift in appropriate terms by the predeceasing son to another person would have carried the father's gift, even though that other person, though surviving the son, predeceased the father, and that is consistent only with the narrow view of the section. Possibly, the actual decision may be supported on the ground that if, for the purpose of supporting the gift, the son is treated as surviving the father, it was impossible almost in the same breath to treat the father as surviving the son for the purpose of benefiting under the will; so that the father had to be treated as being under a special disability unlike any other object of the predeceasing son's bounty.

The last case which directly supports the narrow view is *In re Hurd.*[7] The headnote is long, and I need not read it. I will turn, therefore, to the arguments and the judgment. It is plain from the arguments that no authority was cited to Farwell J., and he dealt with it, after what was clearly a very full argument on each side, as a matter of first principle. He said[8]: " Section 33 of the Wills Act, 1837, provides that the " gift is not to lapse, but is to take effect as if the death of the " legatee had happened immediately after the death of the " testator. If those words be taken literally, it must, in the " present case, be assumed that Sarah died in 1939, immediately " after the death of the testatrix, from which it seems to follow " that the legacy given to her shall be administered according to " the law then in force. In my judgment, however, that is not " the true effect of this section: its object and effect is to " prevent lapse, and its result is that the gift, instead of lapsing, " becomes part of the estate of the deceased person, on the " footing that the legatee was alive at the death of the testatrix " and was therefore a person to whom a legacy could be given. " That result, however, does not, in my judgment, alter the " position that, although Sarah is deemed, for the purpose of

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[6] 19 Ch.D. 612.

[7] [1941] Ch. 196.

[8] Ibid. 198.

"making this gift effective, to have been living in 1939, the "share which she takes under the gift becomes none the less "a part of her estate and must be administered as part of her "estate in accordance with the law in force at the date of her "death in 1923. Obvious difficulties might arise were not that "the true effect of the section. For instance, if a person died "intestate before 1925 and it became necessary to inquire who "were the next-of-kin and an inquiry was ordered, the whole "matter was investigated; and the master's certificate made "finding who were the intestate's next-of-kin, if subsequently "the estate is increased by a legacy given by a person who died "after 1925 and saved from lapse by section 33, if the legacy is "to be administered in accordance with the law after 1925, a "further inquiry as to the next-of-kin will be necessary on the "footing that the intestate's death took place long after it "actually did, and different persons may become entitled. On "the whole I have come to the conclusion that that section "applies only to the prevention of lapse. It is intended only to "prevent the gift from not taking effect, and the result is that a "gift which would otherwise have lapsed passes to the legal per-"sonal representative, who takes it as part of the estate to be "administered in accordance with the law applicable to that "estate. The Wills Act, 1837, does not, in my judgment, so "apply as to alter the way in which the estate should be "administered. It operates only to increase that estate and "does not alter the persons entitled to it under the law in force "at the intestate's death."

In my judgment, support for the narrow view is also to be found in certain cases which, although not dealing directly with the point before me, illustrate the general scope and ambit of the section. In *In re Scott*,[9] Stirling L.J. said [10]: "In section 33 the "effect is to be 'as if the death of' the devisee or legatee 'had "'happened immediately after the death of the testator.' To "ascertain the meaning of this, let me suppose that the testator "by his will has (as in the present case) devised real estate in "fee to a child who predeceases him. If the child had survived "the testator, the will would have passed the real estate to that "child in fee; and the legislature prescribes that, notwith-"standing the death of the child, the legal effect of the will shall "be the same—that is to say, that the will shall pass the real "estate to the child in fee. Such seems to me the natural

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[9] [1901] 1 K.B. 228.

[10] Ibid. 239.

"meaning of the language of the Act; nor can I see any difficulty "in understanding it. The legislature has simply provided that "in certain cases there shall be a posthumous addition to the "property of a deceased person, the object of such provision "being to place that additional property at the disposal of the "deceased while still living. At this point, in my judgment, "the operation of the Wills Act ceases; and this additional "property is left to go and devolve as part of the property of "the deceased child. If the child, while living, entered for "valuable consideration into any contract with reference to such "property (as, for example, by way of sale or mortgage, or by "way of covenant in a marriage settlement), by such contract "the property will be bound. If the child made a will by which "such property is, by appropriate language, disposed of, either "specifically or otherwise, the property will pass under such "disposition. If the child died intestate, the property will go to "the persons entitled by law as upon an intestacy. If the child "died an undischarged bankrupt, it will vest in the trustee in "bankruptcy, and so on." Subsequently he quotes from a judgment of Jessel M.R. in *Pickersgill* v. *Rodger*,[11] and says[12]: "Sir George Jessel M.R., speaking of section 33 of the Wills "Act, says[13]: 'The result, therefore, is this, that the child "'dying in the testatrix's lifetime has his estate augmented "'by the devise or bequest made to him by the testatrix; in "'other words, the subject of the devise or bequest falls into the "'estate of the child, and of course can be disposed of by the "'will of that child, if that will contains apt words to dispose "'of it.'"

Those passages in the judgments of Stirling L.J. and Jessel M.R. appear to me inconsistent with the wide view. To take an example, if a predeceasing child gives all his residue to X, who survives him but predeceases the child's father, X will receive the residue of the child's estate on the child's death; but, when the father dies leaving the child a legacy which, on the true construction of the child's will, falls into residue, then, if the wide view be correct, X will not take the legacy but it will be undisposed of. Again, if the wide view be right, as Farwell J. pointed out, there may be two sets of next-of-kin, and equally under the child's will there may easily be two classes of beneficiary; for example, if the child leaves a residue to a class, there may be one class at the date of his real death and quite a different class at the date of his notional or fictitious death. If that view be right, that seems to me quite inconsistent with the words of Stirling L.J. that "additional property is left "to go and devolve as part of the property of the deceased child," and with the words of Jessel M.R. that "the subject of the "devise or bequest falls into the estate of the child, and of "course can be disposed of by the will of that child, if that "will contains apt words to dispose of it."

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[11] (1876) 5 Ch.D. 163.

[12] [1901] 1 K.B. 228, 241.

[13] 5 Ch.D. 163, 172.

I must now turn to the authorities which are in support of the wide view. The first one is *In the Goods of Mary Councell.*[14] The headnote reads: "The deceased, a legatee under the "will of her father, died in his lifetime, leaving issue living "at his death. She also left a husband surviving her, who, "however, died before the father, having made a will, in which "he appointed executors who took probate of the same. The "court granted administration to the son of the deceased limited "to the personal estate bequeathed to her by the will of her "father, and dispensed with the renunciation or citation of the "surviving executor of the will of the husband of the deceased." The argument was[15]: "Dr. Spinks Q.C. moved for administra-"tion to be granted to Edward Gough Councell, her son. The "33rd section, Wills Act (1 Vict. c. 26), enacts, that where a "legatee being a child of the testator shall die in his lifetime, "leaving issue, the bequest shall take effect as if the death of "such legatee had happened immediately after the death of the "testator. If that had been so in this case, Mrs. Councell would "have died a widow, and her son would have been entitled to "administration."

From the report it does not appear that there was any formal or reasoned judgment by Lord Penzance, for the report merely continues by setting out the form of the letters of administration which Lord Penzance granted to Mrs. Councell's son. The report then states[16]: "He"—i.e., Lord Penzance—"further dispensed with the renunciation or citation of the "surviving executor of the will of the said Thomas Inman "Councell." As the latter, or the executors of the latter, were the only persons entitled or interested to urge that the narrow view was the true construction of the section, it seems curious that he should have dispensed with the citation of them. It is clear that the matter was never argued before Lord Penzance, and it is also noteworthy that, although *Pearce* v. *Graham*[17] had been decided some eight years previously, that case was not cited to him.

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[14] (1871) L.R. 2 P. & M. 314.

[15] Ibid.

[16] Ibid. 315.

That case was followed in *In re Allen's Trusts*.[18] I need not read the facts. Mr. Galbraith appeared for the two children of Harriet Iffinger, and he cited *In the Goods of Mary Councell*,[19] and submitted that the next-of-kin of Harriet Iffinger were to be ascertained at the date of her notional death; that is, as if she had died immediately after the death of the testator. Mr. Richards, for the surviving trustee and residuary legatee, referred to *In re Hensler*.[20] Examination of the facts shows that Mr. Richards' client was not interested in any way in the property which was in court. The sole contest was between the two children of Harriet Iffinger and their father who, if the narrow view be right, would be the person entitled to the property. He was not, or his executors were not, present, and therefore again the point was never argued. Neville J.'s judgment is reported in these words[21]: "Neville J. held that the "decision in *In the Goods of Mary Councell*[22] covered the point. "Having regard to the language of section 33 of the Wills Act, "1837, Harriet Iffinger must be deemed to have died imme- "diately after the death of the testator for the purposes of "the bequest, and her next of kin must be ascertained at that "date. Her two children were her next of kin at that date, and "were the proper persons to take out representation to her "estate." As I understand it, Neville J. merely followed *In the Goods of Mary Councell*,[23] the contrary view never having been urged before him.

I was also referred to *In re Hone's Trusts*,[24] a decision of Pearson J. *Pearce* v. *Graham*[25] was cited and discussed during the argument, and it is true that Pearson J. did not disapprove of it; but I do not think that *In re Hone's Trusts*[26] really assists me on the point that I have to consider. Those are all the relevant authorities which the research and industry of counsel on both sides have revealed on this point.

I respectfully agree with the views expressed by Farwell J. in *In re Hurd*.[27] In my judgment, the section is aimed solely at preserving the gift in the parent's will, and it is not in any way concerned to alter the administration of the predeceasing child's estate. The words in the section, "but shall take effect "as if the death of such person had happened immediately after "the death of the testator," are, in my judgment, put into the section solely to explain and amplify the immediately preceding phrase, that is, "such devise or bequest shall not lapse," and are quite inappropriate to alter the devolution of the child's estate in relation to the parent's gift by imputing, to the predeceasing child, death at a fictitious date. I am not, in my judgment, precluded from following the decision of Farwell J. by the decisions in *In the Goods of Mary Councell*[28] and *In re Allen's Trusts*,[29] for the reason, as I have pointed out, that they cannot be regarded as satisfactory decisions. I am fortified in the conclusion which I have reached that *In re Hurd*[30] is to be preferred to *In the Goods of Mary Councell*[31] and *In re Allen's Trusts*[32] by the views expressed by the editors of Jarman on Wills, 8th ed. (1951), Vol. 1, at p. 468, and of Theobald on Wills, 10th ed. (1947), at p. 560.

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[17] 32 L.J.Ch. 359.

[18] [1909] W.N. 181.

[19] L.R. 2 P. & M. 314.

[20] 19 Ch.D. 612.

[21] [1909] W.N. 181.

[22] L.R. 2 P. & M. 314.

[23] Ibid.

[24] 22 Ch.D. 663.

[25] 32 L.J.Ch. 359.

[26] 22 Ch.D. 663.

[27] [1941] Ch. 196.

Accordingly, the persons interested on the intestacy of Mrs. Basioli are to be ascertained as at the date of her death in 1929; and I will declare that on the true construction of the will of the testatrix, and of section 33 of the Wills Act, 1837, the bequests and devises in the will of the testatrix in favour of Mrs. Basioli did not lapse, but fell into the estate of Mrs. Basioli as additions to her original estate and devolve on her intestacy in the same way as her original estate. The costs of all parties as between solicitor and client must be paid out of Mrs. Basioli's estate in due course of administration. I am very much indebted to both counsel for their very careful research into the authorities and for their arguments on this interesting point.

Declaration accordingly.

Solicitors: *Arnold Carter & Co., for Dunn & Baker, Exeter.*

K. R. A. H.

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[28] L.R. 2 P. & M. 314.
[29] [1909] W.N. 181.
[30] [1941] Ch. 196.
[31] L.R. 2 P. & M. 314.
[32] [1909] W.N. 181.

1953
Mar. 3, 30.

Vaisey J.

MORNINGTON PERMANENT BUILDING SOCIETY *v.* KENWAY AND OTHERS.

[1952 M. 2102.]

Landlord and Tenant—Mortgage—Registered land—Letting by purchaser in possession—Tenant in possession before execution of mortgage—Right of tenant against mortgagees—Tenancy ranking in priority to mortgage—Land Registration Act, 1925 (15 *Geo.* 5, *c.* 21), *s.* 70 (1) (*g*).

The purchaser of a house, which was registered land, executed deeds of mortgage and further charge to a building society on February 9, 1949, the same day as that on which the deed of transfer to him of the property was executed. He attorned tenant to the mortgagees at a monthly rent. The provisions of the mortgage deed excluded the power of leasing. All the necessary registrations were effected.

On February 4, 1949, X and Y had entered, at the mortgagor's request, into occupation as tenants of the first and second floors of the house respectively.

The instalments due under the mortgage fell into arrear, and the mortgagees gave to the mortgagor notice to quit the premises within seven days.

X and Y claimed to be entitled to remain in occupation, and the mortgagees took proceedings by originating summons against the mortgagor and against X and Y in which they claimed delivery to them of possession of the premises. The mortgagor did not appear:—

Held, (the mortgagor having no defence to the plaintiff's claim), that, as the defendant tenants were in actual occupation at the date of the execution of the mortgage, the plaintiffs were affected by notice of their rights; so that the tenants' right to possession was protected by section 70 (1) (*g*) of the Land Registration Act, 1925.

Woolwich Equitable Building Society v. *Marshall* [1952] Ch. 1; [1951] 2 T.L.R. 783; [1951] 2 All E.R. 769, followed.

Coventry Permanent Economic Building Society v. *Jones* [1951] W.N. 218; [1951] 1 T.L.R. 739; [1951] 1 All E.R. 901, considered.

ORIGINATING SUMMONS.

The plaintiffs, Mornington Permanent Building Society, as mortgagees, claimed possession of a house, No. 2 White Hart Lane, Wood Green, Middlesex. The defendants were Sydney Henry Wilfred Kenway, the mortgagor, who had no defence and did not appear, and Henry George Anderson and Kenneth William Johnstone, who claimed to be tenants respectively of the upper and lower flats of the mortgaged property. The only question was whether the rights of the latter defendants under their respective tenancies were subject, or had priority, to the rights of the plaintiffs.

The property was registered land, held under a lease for 99 years from June 25, 1933. It was transferred to the mortgagor by an instrument of transfer, dated February 9, 1949. By a mortgage and further charge, both dated February 9, 1949, the property was charged with the payment to the plaintiffs of sums of £1,500 and £110, repayable by instalments with interest as therein mentioned. The mortgagor was registered as proprietor of the premises with a good leasehold title on February 14, 1949, and the plaintiffs were registered as proprietors of the mortgage and further charge on the same date. Several of the instalments under the mortgage were unpaid and in arrear, and the sum of £1,455 and upwards was due and owing to the plaintiffs on the security of the mortgage and further charge. Under the mortgage the powers of leasing conferred on mortgagors by section 99 of the Law of Property Act, 1925, were declared to be inapplicable to the security, and the mortgagor thereby attorned and became tenant to the plaintiffs of the premises at a monthly rent, with a proviso that the plaintiffs might at any time determine the tenancy without giving him notice to quit. By way of precaution, however, a notice to quit the premises within seven days was given by the plaintiffs to the mortgagor on January 23, 1952, so that the case against him was completely established.

The defendant Anderson, having been a tenant of the mortgagor in other premises, on February 4, 1949, at his request, moved into two rooms and a kitchenette on the second floor of the premises, which the mortgagor let, or purported to let, to him unfurnished as a separate dwelling, together with the right to use a bathroom and lavatory, at a weekly rent of £1 5s. 0d. including rates. He was given a rent book, which was corroborative of the claim which he made, had been in possession, under his tenancy, since February 4, 1949, down to the present time, and was (in the view of Vaisey J.) protected in his tenancy under the Rent Restriction Acts, 1920 to 1939.

The position of the defendant Johnstone was exactly the same. He moved into two rooms on the first floor and one room and a kitchen on the ground floor of the premises, with similar rights as to the use of a bathroom and lavatory, and this accommodation was let to him by the mortgagor at a weekly rental of £1 5s. He took possession on February 4, 1949. His rent book corroborated his claim and he was still in possession.

J. L. Arnold for the building society. The matter is concluded by the fact that this is registered land: see *Woolwich Equitable Building Society* v. *Marshall.*[1] The facts are not distinguishable from those in *Coventry Permanent Economic Building Society* v. *Jones.*[2] The conveyance and the mortgage were executed on the same date and the money was paid directly by the society to the vendor. There is neither a recital, as in *Woolwich Equitable Building Society* v. *Marshall,*[3] nor a difference in date, as regards the conveyance and the mortgage, as was the case in *Universal Permanent Building Society* v. *Cooke,*[4] where the mortgage was dated one day later than the conveyance. There was, in the present case, no scintilla temporis in which a legal tenancy could be granted to the tenants.

The true position is that, at the moment before the transfer to Kenway, all that he had was an equitable interest and, therefore, all that he could confer on anyone else was an equitable interest. He purported to grant tenancies, but, in effect, there was only an agreement to grant them: see *City Permanent Building Society* v. *Miller.*[5]

There is nothing in the Land Registration Act, 1925, which precluded the society from entering into possession of the premises.

J. D. Semken for the tenants. If the mortgagor was competent to grant this mortgage, he was competent to grant these two tenancies as an interest at law. The position of the tenants depends on whether the purchaser had notice of the tenancies or not. [He referred to *Hunt* v. *Luck.*[6]]

In *Coventry Permanent Economic Building Society* v. *Jones*[7] there was an agreement in writing. In the present case the agreement was oral and the tenants do not know whether they have leases or agreements for leases. They cannot be disturbed, as they are amply protected by section 70 of the Land Registration Act, 1925.[8] [He also referred to sections 23 and 26 of that statute.]

Cur. adv. vult.

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[1] [1952] Ch. 1.

[2] [1951] 1 All E.R. 901.

[3] [1952] Ch. 1.

[4] [1952] Ch. 95; [1951] 2 T.L.R. 962; [1951] 2 All E.R. 893.

[5] [1952] Ch. 840; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621.

[6] [1901] 1 Ch. 45.

[7] [1951] 1 All E.R. 901.

[8] Land Registration Act, 1925, s. 70 (1): "All registered land shall ". . . be deemed to be subject to "such of the following overriding "interests as may be for the time "being subsisting in reference there-"to . . . (that is to say) . . . (g) the "rights of every person in actual "occupation of the land . . . save "where inquiry is made of such per-"son and the rights are not dis-"closed. . . ."

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March 30. VAISEY J., reading his judgment, after stating the facts:—There have recently been several decisions in cases involving the rights and liabilities of mortgagees and tenants in circumstances similar to those which arise in the present case; the first is *Coventry Permanent Economic Building Society* v. *Jones*,[1] in which Harman J. held that the conveyance to the mortgagor and the mortgage to the mortgagees ought to be regarded as one transaction, with the result that there was no interval of time, however short, during which a so-called tenancy by estoppel became an actual tenancy. That case, however, is not really relevant to the present case for the reason that the property there was not registered land. But I may observe that the decision seems to me to be consistent with and indeed consequent on *In re Connolly Brothers Ld.* (*No.* 2),[2] a decision of the Court of Appeal, which would seem to have been somewhat unaccountably overlooked in the recent authorities. I will read the headnote to the report of that case.

"A company issued debentures creating a floating charge "upon their undertaking and all their property present and "future, one of the conditions of the debentures being that the "company should not be at liberty to create any other mortgage "or charge in priority to the debentures. All the debentures "were duly registered under the Companies Act, 1900. The "company desiring to purchase certain property, which they had "not the money to pay for, borrowed £1,000 from O. upon terms "that she should have a charge upon the property so purchased. "The company then bought the property for £1,100 and paid a "deposit of £150. Upon completion of the purchase O. was "present and gave her cheque for £1,000, which was paid into "the company's banking account, the company paying the "balance of the purchase-money to the vendor in cash. The "same solicitor acted for all parties, and he took and retained "the title deeds of the property on behalf of O. A week later "the company executed in favour of O. a memorandum of "equitable charge upon the property. The solicitor did not "investigate the title nor search the register of debentures on "O.'s behalf. In an action to realize the debentures:—*Held*, "that what the company acquired upon the purchase was only "the equity of redemption in the property subject to the equitable "charge of O., who was accordingly entitled to priority over the "debentures. Decision of Warrington J. affirmed."

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[1] [1951] 1 All E.R. 901.

[2] [1912] 2 Ch. 25.

The next case is *Woolwich Equitable Building Society* v. *Marshall*,[3] which seems to me to conclude the present case in favour of the tenants on the ground stated by Danckwerts J. in that case, namely, that the tenants were persons in actual occupation of the property; a principle established in *Hunt* v. *Luck*[4] is that a tenant's occupation of land affects a purchaser with notice of all the tenant's rights. If the plaintiffs in the present case had taken the trouble to inspect the property, before parting with their money, they would have found the tenants in possession, and, as they omitted to take this precaution, their rights are, I think, overridden by virtue of section 70 (1) (*g*) of the Land Registration Act, 1925.

Another case, *Universal Permanent Building Society* v. *Cooke*,[5] was decided on a somewhat different point. And, finally, in the case of *City Permanent Building Society* v. *Miller*,[6] the facts were materially different, as the tenant did not go into possession until after the date of the mortgage, and the claim was made under section 70 (1) (*k*) and not, as here, under section 70 (1) (*g*).

It is alleged in this case that Kenway has been guilty of a breach of covenant by purporting to exercise his statutory powers under section 99 of the Law of Property Act, 1925; but this is, of course, a mistake, for he did not purport to create any tenancy after he had granted the mortgage. Any claim against him for creating the tenancies must rest on his covenants for title implied in the mortgage by his having demised the property as beneficial owner.

For these reasons I think that, as against Anderson and Johnstone, the summons fails, and must be dismissed with costs.

Summons dismissed as against second and third defendants.

Solicitors: *Walter Jennings & Son; Malcolm Slowe & Co.*

J. L. D.

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[3] [1952] Ch. 1.

[4] [1901] 1 Ch. 45; 17 T.L.R. 3.

[5] [1952] Ch. 95.

[6] [1952] Ch. 840.

In re HUTCHINSON'S WILL TRUSTS.
GIBBONS *v.* NOTTINGHAM AREA NO. 1 HOSPITAL MANAGEMENT COMMITTEE.

1953
Mar. 26, 27.

Upjohn J.

[1952 H. 3113.]

Will—Charitable bequest—Gift to a hospital—Hospital closed and assets transferred to another hospital between date of will and death of testator—No formal scheme of amalgamation—Effectiveness of gift.

A testator by his will made in 1946 bequeathed his residue on trust in equal shares for five hospitals in Nottingham, including "the Nottingham and Nottinghamshire Hospital for Diseases of the "Throat, Ear and Nose of 63 Goldsmith Street, Nottingham," and directed that the receipts of the respective treasurers or secretaries of the named institutions should be effective discharges to the trustees of the said shares of residue.

In 1947 the governors of the Throat Hospital decided that it was desirable to close that hospital, in view of the impending coming into force of the National Health Service Act, 1946, and because the buildings were out of date and the hospital small and uneconomical to run. They made certain proposals to the Minister of Health, which were approved, and on October 29 the subscribers passed a resolution "that the hospital, its properties and funds, "be amalgamated, and the patients' waiting list be transferred to "the ear, nose and throat wing of the Nottingham General "Hospital" in accordance with a scheme approved by the Minister. No scheme was ever submitted to the court or the Charity Commissioners.

The Throat Hospital then closed, and the property and assets were transferred to the General Hospital on trusts providing that the property and assets should be held separately from its general funds and applied for the purposes of its ear, nose and throat department.

On July 5, 1948, the property and assets of the Nottingham General Hospital vested in the defendant committee under the Act of 1946. In 1952 the testator died. On the hearing of a summons taken out to ascertain whether (a) the gift to the Throat Hospital took effect in favour of the committee, or (b) whether it failed and passed to the next-of-kin, or (c) whether it was applicable cy-près:—

Held, that the testator, in bequeathing his residue between five hospitals in Nottingham, was intending to benefit the work of each charity generally, and not merely the particular institution as carried on at the date of the will; so that the gift to the Throat Hospital took effect, as that charity could not die.

Semble, that to enable the defendant committee to give a good receipt for the gift, a proper scheme might have to be prepared and approved by the court or Charity Commissioners.

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In re Faraker [1912] 2 Ch. 488; *In re Withall* [1932] 2 Ch. 236, and *In re Lucas* [1948] Ch. 424; 64 T.L.R. 343; [1948] 2 All E.R. 22, applied.

In re Ovey (1885) 29 Ch.D. 560; 1 T.L.R. 401, distinguished.

ADJOURNED SUMMONS.

In 1887, there was opened in Nottingham a hospital known as the Nottingham and Nottinghamshire Hospital for Diseases of the Throat, Ear and Nose, which carried on its work at a number of addresses, and, finally, at 63 Goldsmith Street, Nottingham. During the course of its activities, the hospital purchased certain adjacent houses with a view to enlarging the hospital premises. In 1947 it became clear that the specialized hospital work that the hospital had been carrying on was no longer conveniently able to be carried on by the hospital for a number of reasons.

The first was that, with the impending transfer of the hospitals to the Minister of Health under the National Health Service Act, 1946, it was difficult to find honorary surgeons to carry on the work in the few remaining months of private ownership before the transfer date, July 5, 1948. Another reason was that the hospital was small, containing only 12 beds, and was uneconomical to run. Further, the in-patients' department no longer complied with modern standards.

For these reasons, the governors of the hospital put to the Minister of Health a scheme for his approval on September 16, 1947. They suggested that it should be closed and that its invested funds, which amounted to some £13,000, and its real property should be transferred to the Nottingham General Hospital for the express and exclusive use of the throat, ear and nose wing of that hospital. They also proposed to make certain investments in the name of the trustees to provide a testimonial to the matron and to the night nurse. The Minister of Health on October 8, 1947, approved of that plan. The approval was not of any force or effect to constitute an amalgamation between the old hospital and the general hospital in the sense that the Charity Commissioners or the court could have effected. The assent and approval of the Minister were necessary only because the governors of the old hospital were proposing to part with funds and with assets, which would otherwise vest in the Minister on the vesting date.

That scheme being approved, the subscribers passed the following resolution on October 29, 1947: "That the hospital, "its properties and funds, be amalgamated, and the patients' "waiting list be transferred to the ear, nose and throat wing "of the Nottingham General Hospital, in accordance with "schemes submitted to and approved by the Minister of Health, "including therein the transfer to trustees of the sum of £1,500 "as a pension fund."

The resolution having been passed, the old hospital closed down, the patients being transferred to the ear, nose and throat wing of the general hospital. The chairman of the governors of the old hospital joined the board of governors of the general hospital. The waiting list was transferred to the general hospital's waiting list; and out-patients, who had previously been treated at the old hospital, were thereafter treated at the ear, nose and throat wing of the general hospital. Recommendations or vouchers from contributors to the funds already held by patients of the old hospital were accepted at the general hospital. In addition, a tablet was erected in the ear, nose and throat wing of the general hospital, inscribed: "This plaque records that, "after a period of sixty years' service in this city, the Nottingham "and Notts Ear, Nose and Throat Hospital was amalgamated "with the ear, nose and throat department of the Nottingham "General Hospital on December 1, 1947."

The investments of the old hospital, after the deduction of the sum of £1,500 for the testimonial aforesaid, were transferred to the trustees of the general hospital, but upon the terms that the investments were to be held and administered as a capital fund separate from the general funds of the general hospital, and were to be applied to the general purposes of the ear, nose and throat department of the general hospital. In addition, the other properties of the old hospital were conveyed to trustees on special trusts which were set out in a deed of February 18, 1948: the trusts being that the property and money arising under the trust for sale had been conveyed to the trustees as trustees for sale and were held "to the intent that the same should be adminis-"tered as a capital fund separate from the general funds of "the general hospital"; and also that they held "the rents and "profits of the said property until sale upon trust to apply the "same as income for the general purposes of the ear, throat and "nose wing of the Nottingham General Hospital as the trustees "should think most beneficial for promoting the objects of the "said wing." The Nottingham General Hospital was now

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represented by the first defendants, the Nottingham Area No. 1 Hospital Management Committee.

In 1946, the testator, Herbert Hutchinson, a retired solicitor living in Nottingham, made his will. After a number of bequests in clause 4 he made large charitable bequests amounting in all to £22,000 to some six charitable institutions or purposes. In clause 5 of his will, he gave his residuary real and personal estate to his trustees upon the usual administration trusts, and directed that they should " stand possessed of the residue of such proceeds " and of my ready money in trust for the Nottingham General " Hospital, the Nottingham Children's Hospital, the Nottingham " Hospital for Women, the Nottingham and Nottinghamshire " Hospital for Diseases of the Throat, Ear and Nose of 63 Goldsmith Street, Nottingham, and the Nottingham and Midland " Eye Infirmary in equal shares." He continued: " And I " declare that the receipts of the respective treasurers or secretaries for the time being of the said hospitals and infirmary " shall be effectual discharges to my trustees for the said shares " of residue respectively." That will was made while the old hospital was in existence. The testator died on February 17, 1952. The residue amounted to about £20,000.

The summons was taken out to ascertain whether the gift to the old hospital (a) took effect in favour of the defendant committee, or (b) failed, and passed to the next-of-kin, or (c) ought to be administered cy-près.

K. W. Rubin (*R. W. Goff* with him) for the trustees.

John Monckton for the committee.

G. M. Parbury for the next-of-kin.

N. S. Warren (*Denys Buckley* with him) for the Attorney-General.

The arguments are set out in the judgment.

The following cases, not referred to in the judgment, were cited in argument: *In re Whittaker* [1]; *In re Wilson* [2]; *In re Davis* [3]; *In re Harwood.* [4]

UPJOHN J., after stating the facts: In those circumstances, the question which I have to determine is whether the gift to the old hospital takes effect in favour of the first defendant, or whether it has failed, and there is a lapse; or whether the share given to the old hospital is applicable cy-près.

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[1] [1951] 2 T.L.R. 955; [1951] W.N. 549.

[2] [1913] 1 Ch. 314.

[3] [1902] 1 Ch. 876.

[4] [1936] Ch. 285.

Mr. Monckton, for the first defendants, contended that there was here an amalgamation or consolidation of the old hospital with the wing of the general hospital. He pointed out that a charity, once constituted, could not die (unless its funds became exhausted), but must continue; and he referred me to the well-known case of *In re Faraker.*[1] He argued that the gift in this will was not a gift merely for the work of the charity carried on at the particular premises at 63 Goldsmith Street, Nottingham, but for the work of the charity constituted in 1887 generally, and that that work was now represented by the work of the Nottingham General Hospital. Naturally, he also relied on *In re Lucas,*[2] and the decision of Chitty J. in *In re Joy,*[3] where two societies had been amalgamated, and it was held that a gift to one of those societies was effective to carry it to the amalgamated society. In this connexion, I was also referred by Mr. Warren, for the Attorney-General, to *In re Withall.*[4]

Mr. Monckton put his case in an alternative way. He said that it was really a gift for the work carried on by the general hospital, and he relied on *In re Morgan's Will Trusts,*[5] *In re Glass,*[6] reported as a footnote to that case, and *In re Meyers.*[7] With regard to this alternative submission, it is to be observed that those cases are cases dealing with the construction of the National Health Service Act, 1946. In those cases it was argued that, because there had been a vesting of the hospital property in the Minister, the gift made by the will failed, but it was held that that was not so. The gifts were intended for the work carried on at the particular hospital, and it was a fundamental to the decision of Roxburgh J. in *In re Morgan's Will Trusts*[8] that there must be evidence that the work was being carried on upon the same premises. That was the real basis of the decision. Accordingly, it does not seem to me right to rely upon the analogy of those cases, which were really directed to a different point.

On the other hand, Mr. Parbury, who argued for those who are entitled upon an intestacy, submitted: Here, upon the true construction of the testator's will, was a gift for the particular purposes of a particular institution, and so, if the institution has become extinct, the gift must fail. He naturally pressed me with the decision in *In re Rymer*,[9] and particularly with the judgment of Lindley L.J., who said: "But when once you "arrive at the conclusion that a gift to a particular seminary "or institution, or whatever you may call it, is 'for the purposes "'thereof,' and for no other purpose—if you once get to that, "and it is proved that that institution or seminary, or whatever "it is, has ceased to exist in the lifetime of the testator, you are "driven to arrive at the conclusion that there is a lapse, and "then the doctrine of cy-près is inapplicable." Mr. Parbury said that that was the case here.

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[1] [1912] 2 Ch. 488.

[2] [1948] Ch. 424; 64 T.L.R. 343; [1948] 2 All E.R. 22.

[3] (1888) 60 L.T. 175; 5 T.L.R. 117.

[4] [1932] 2 Ch. 236.

[5] [1950] Ch. 637; 66 T.L.R. (Pt. 1) 1037; [1950] 1 All E.R. 1097.

[6] [1950] Ch. 643n.; [1950] 2 All E.R. 953n.

[7] [1951] Ch. 534; [1951] 1 T.L.R. 435; [1951] 1 All E.R. 538.

[8] [1950] Ch. 637.

Secondly, he said that there was no amalgamation or consolidation here, because no scheme had been approved by the court or by the Charity Commissioners. He said that what had happened was this: the work of the institution could no longer be carried on, not so much because of financial stringency, but because of difficulties with the staff, in finding honorary surgeons, and difficulties over the accommodation which was quite out of date. Therefore, the work of the hospital came to an end. All that happened was that the assets of that hospital were transferred to an entirely separate institution, and it could not be said that there was here, in the sense in which it was understood in *In re Lucas* [10] and the other cases I have mentioned, an amalgamation or consolidation. He also pressed me with the case of *In re Ovey*.[11] In that case, there was a gift to the "Ophthalmic Hospital (near Hanover Square, London)." The facts proved were that there had been, some nine or 10 years before the testator made his will, an ophthalmic hospital near Hanover Square, but that that hospital's affairs had been wound up, and the assets transferred to the well-known Moorfields Hospital. According to Mr. Parbury, that is exactly what has happened here. It was held in that case that there was a lapse, and that there was no room for the application of the testator's gift cy-près. But it is fair to point out that the Moorfields Hospital do not appear to have been a party to the proceedings. Therefore, although Mr. Vaughan Hawkins, for the Attorney-General, mentioned that it might be right to give the legacy to the Moorfields Hospital, it seems clear from the report of the argument that he really based his argument upon the principle of cy-près; and the real debate in that case was whether there was a lapse, or whether there was room for the application of the cy-près doctrine. The point that the Moorfields Hospital might be entitled as representing the continuance of the Hanover Square Hospital was never really argued.

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[9] [1895] 1 Ch. 19, 35; 11 T.L.R. 20.

[10] [1948] Ch. 424.

[11] (1885) 29 Ch.D. 560; 1 T.L.R. 401.

In my judgment, the principle which I have to apply is clear. It is primarily a matter of construction of the will. If this gift is a gift to a particular institution carried on in a particular place and for no other purpose, then, if that institution has ceased, there is a lapse, unless on the true construction of the will there is some overriding general charitable intention. But if it is a gift for the general work of that charity generally and it is to be construed as a gift in augmentation of the funds of the charity, then there cannot be a lapse because the charity cannot die. That seems to me to be the effect of the cases of *In re Faraker*[12] and *In re Lucas.*[13]

I turn then to this will. *In re Lucas*[13] makes it plain that the mere fact that the testator has referred to the address of the old hospital is not decisive of the matter one way or the other. *In re Meyers*[14] makes it clear, that the fact that there are no longer treasurers or secretaries capable of giving receipts again is not decisive of the matter.

What was the intention of the testator in making these gifts and disposing of the whole of his residue between the five hospitals in Nottingham, the General Hospital, the Children's Hospital, the Women's Hospital, the Hospital for Throat, Ear and Nose Diseases, and the Eye Hospital? In my judgment, he was intending to benefit not merely these particular institutions carried on at the places where they were respectively being carried on at the time he made his will, but he was intending to benefit the work of each charity as such. I cannot think, had one of them amalgamated in the true sense with another, that the testator would have thought for one moment that his gift would have failed. In my judgment, he was intending to benefit the charitable work of each of these charities generally, in the sense of augmenting the sums of each of those charities respectively, and not the particular institution carried on in certain particular premises in each case.

I am guided to that conclusion by the fact that he has given the whole of his residue to these five hospitals dealing with these five branches of sickness in the city of Nottingham. I am assisted in coming to that conclusion by the observations of Lord Greene M.R. in *In re Lucas*.[15] Once that conclusion is reached, it seems to me that the claim of the next-of-kin must necessarily be defeated; because, whatever may have happened to the work of the old hospital, that particular charity cannot die. If it had been wrongly amalgamated with the general hospital, the Attorney-General could intervene. But, once it is found that the gift is for that charity, and not for the work carried on upon those particular premises, the cases make it clear that there cannot be a failure of the gift; and, therefore, there cannot be any case of lapse.

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[12] [1912] 2 Ch. 488.

[13] [1948] Ch. 424.

[14] [1951] Ch. 534.

I think that that is made particularly clear by *In re Withall*.[16] In that case, there was some doubt as to whether the amalgamation was valid. There may be some doubt about it here, although I do not myself desire to cast any doubt upon it. But, at all events, it seems to me, bearing in mind the observations of Clauson J. in that case, that the claim of the next-of-kin is defeated; and, therefore, I propose to follow the course taken by Clauson J. and declare that the one-fifth share of residue is not undisposed of by the will, but is held as part of the assets of the Nottingham and Nottinghamshire Hospital for Diseases of the Ear, Throat and Nose.

I shall not declare that the first defendants are entitled to the gift; I imagine that they will be, but the Attorney-General may have something to say about the matter. I am merely excluding the next-of-kin. Possibly it may be necessary for the first defendants to prepare a scheme for the approval of the court or the Charity Commissioners, to enable them to give a receipt for the gift.

Declaration accordingly.

Solicitors: *Loxley & Preston for Clifton, Woodward & Smith, Nottingham; Peacock & Goddard for Acton, Simpson & Hanson, Nottingham; Treasury Solicitor.*

F. R. D.

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[15] [1948] Ch. 424.

[16] [1932] 2 Ch. 236.

NESTLE CO. LD. *v.* INLAND REVENUE COMMISSIONERS.

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1953
Mar. 9, 10.

Evershed M.R., Jenkins and Hodson L.JJ.

Revenue—Stamp duty—Capital duty—Exemption—Increase of capital of English company for acquisition of share capital of companies incorporated in Northern Ireland—Whether foreign company an "existing company"—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 112, 113—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 55 —*Finance Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 28), *s.* 41.

A company incorporated in England under the Companies Act, 1948, in 1951 increased its capital by £3,410,000 for the purpose of acquiring not less than 90 per cent. of the share capital of four companies, two being companies which had been incorporated in England and the other two having been incorporated pursuant to the Companies Act (Northern Ireland), 1932. The Commissioners of Inland Revenue refused to allow exemption from stamp duty under the provisions of section 55 (1) (A) of the Finance Act, 1927 (as amended), in respect of the amount of the increased capital referable to the taking over of the shares of the two companies incorporated in Northern Ireland. Danckwerts J. dismissed the appeal by case stated from their decision. On appeal:—

Held, dismissing the appeal, that the word "company" in section 55 of the Finance Act, 1927, must be given a restricted and technical meaning, and meant a body corporate of the kind indicated in sections 112 and 113 of the Stamp Act, 1891—that was to say, a body corporate incorporated under letters patent of Her Majesty or according to the laws general or special of England, Wales and Scotland; and that "any particular existing company" in section 55 did not include a company incorporated in Northern Ireland where, following the Government of Ireland Act, 1920, the power to legislate as regarded both stamp duty and joint stock companies for Northern Ireland was transferred to the Northern Ireland Parliament; and that accordingly the Commissioners were right.

The fact that in 1922, pursuant to the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922 (S.R. & O., 1922, No. 80), the Stamp Act, 1891, was made mutatis mutandis part of the local law of Northern Ireland did not mean that because capital duties in accordance with its provisions had been paid in respect of a Northern Ireland company such a company could be treated as a "particular existing company" for the purposes of section 55 of the Finance Act, 1927.

Decision of Danckwerts J. [1952] 1 All E.R. 1388, affirmed.

APPEAL from Danckwerts J.

The Nestlé Company Ld. was incorporated in England under the Companies Act, 1948. In March, 1951, it increased its capital by 3,410,000 shares of £1 each. This increased capital was authorized for the purpose of acquiring not less than 90 per cent. of the shares of four companies, two of which were companies incorporated in Northern Ireland. The Commissioners of Inland Revenue refused to exempt from capital duty so much of the increased capital as was to be issued for the purpose of acquiring the share capital of the two companies incorporated under the law of Northern Ireland. The Commissioners stated a case pursuant to section 13 of the Stamp Act, 1891.[1] Danckwerts J.[2] upheld their decision.

The Nestlé Company appealed.

The facts are more fully stated in the judgment of Evershed M.R.

Frederick Grant Q.C., *John Senter* and *Roderick Watson* for the Nestlé Company Ld. This appeal turns on the construction of section 55 of the Finance Act, 1927,[3] as amended by section 41 of the Finance Act, 1930.[4] It is first submitted that in section 55 the word " company " should be construed in its general sense as including any company whether incorporated under the law of England or elsewhere. It cannot be disputed that the Nestlé Company is a transferee company within paragraph (A) of subsection (1) and accordingly entitled to relief from capital duty if the other conditions of paragraph (A) are fulfilled. Up to 1930 the benefits conferred by paragraph (A) were limited to companies which had paid capital duty under section 112 of the Stamp Act, 1891. Since section 55 was amended by the Act of 1930 that limitation no longer applies. The judge, however, thought that because only English companies paid capital duty, therefore only a company which had paid capital duty was within subsection (1) a "particular existing company." It is submitted that that reasoning is wrong.

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[1] Stamp Act, 1891, s. 112: ". . . "a statement of the amount of any "increase of registered capital of any "company now registered or to be "registered with limited liability shall "be delivered to the . . . registrar, "and every such statement shall be "charged with an ad valorem stamp "duty of . . . for every £100 . . . of "the amount of such . . . increase of "capital. . . ."

[2] [1952] 1 All E.R. 1388.

[3] Finance Act, 1927, s. 55: " (1) If "in connexion with a scheme for the "reconstruction of any company or "companies or the amalgamation of "any companies it is shown to the "satisfaction of the Commissioners of "Inland Revenue that there exist the "following conditions, that is to say "—(*a*) that a company with limited "liability is to be registered, or that "since the commencement of this Act "a company has been incorporated by "letters patent or Act of Parliament, "or the nominal share capital of a "company has been increased; (*b*) that "the company (in this section referred "to as 'the transferee company') is "to be registered or has been incorporated or has increased its capital "with a view to the acquisition either "of the undertaking of, or of not less "than 90 per cent. of the issued share "capital of, any particular existing "company; (*c*) that the consideration "for the acquisition . . . consists as "to not less than 90 per cent. thereof "—(i) where an undertaking is to be "acquired in the issue of shares in the "transferee company to the existing "company or to holders of shares in "the existing company; or (ii) where "shares are to be acquired, in the "issue of shares in the transferee "company to the holders of shares in "the existing company in exchange "for the shares held by them in the "existing company; then, subject to "the provisions of this section,—(A) "The nominal share capital of the "transferee company, or the amount "by which the capital of the transferee company has been increased, "as the case may be, shall, for the "purpose of computing the stamp duty "chargeable in respect of that capital, "be treated as being reduced by either "—(i) an amount equal to the amount "of the share capital of the existing "company in respect of which stamp "duty has been paid, or, in the case "of the acquisition of a part of an "undertaking, equal to such proportion of the said share capital as the "value of that part of the undertaking "bears to the whole value of the "undertaking; or (ii) the amount to "be credited as paid up on the shares "to be issued as such consideration as

If, however, for a company to be a "particular existing "company," it must have paid capital duty in order to obtain exemption from capital duty, these two Northern Ireland companies in fact have paid capital duty under the Stamp Act, 1891, since pursuant to the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922, No. 80, made under the powers conferred by the Government of Ireland Act, 1920, the Act of 1891 has become part of the law of Ireland.

Pennycuick Q.C. and *J. H. Stamp* for the Commissioners of Inland Revenue. This appeal turns on the meaning of the word " company " in section 55 (1) of the Act of 1927. It is contended for the Nestlé Company that " company " there means a company incorporated anywhere in the world or, if that is wrong, it includes at least companies incorporated in Northern Ireland. The whole section must be looked at to discover the meaning of the word " company " as it is used there. The section is dealing with the capital duty first imposed by the Customs and Inland Revenue

"aforesaid, whichever amount is the "less."

S. 57 (5): " Such of the provisions "as relate to matters with respect to "which the Parliament of Northern "Ireland has power to make laws "shall not extend to Northern "Ireland."

[4] Finance Act, 1930, s. 41: " Section 55 of the Finance Act, 1927 "(which grants relief from capital "and transfer stamp duty in cases of "reconstruction or amalgamation of "companies) shall—(1) as from the "commencement of this Act have "effect as if the words 'in respect of "'which stamp duty has been paid' "in subsection (1) (A) (i) of the said "section were not contained therein; "and (2) be deemed to have had effect "up to the commencement of this Act "as if after the said words there had "been inserted the words 'or relief "'has been allowed under the pro"'visions of this section.'"

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Act, 1888, and now payable under sections 112 and 113 of the Stamp Act, 1891. Under those sections every company is chargeable with capital duty. The sections, however, only applied to companies incorporated in Great Britain. Section 55 of the Act of 1927 was passed to grant relief from capital duty and conveyance duty on company amalgamations. This appears from the opening words of the section. For the section to operate there must be a scheme of amalgamation: see *per* Buckley J. in *In re South African Supply and Cold Storage Co.*[5] The context makes it clear that the section is only dealing with English companies. One would not expect a section granting relief from English taxation to apply to the amalgamation of companies other than English companies. It would be extraordinary if Parliament were extending relief to schemes of amalgamation of foreign companies.

The Nestlé Company does not dispute that the transferee company must under paragraph (*a*) of section 55 (1) be a company registered in England. That being so, "company" should be given the same meaning in paragraph (*b*). If Parliament had intended the transferor company to include foreign companies it would have said so. If the section extends to foreign companies the difficulties of applying it will be practically insuperable in many cases, owing to the fact that the structure of foreign companies is wholly different to ours in some cases and the position may be complicated by questions of exchange. The provisions of the section generally show that it is intended to limit its operation to United Kingdom companies: *Colquhoun* v. *Heddon.*[6]

If the section does not apply to foreign companies generally, it is submitted that it does not apply to companies incorporated in Northern Ireland. The Government of Northern Ireland Act, 1920, brought Northern Ireland into existence, and from the date when the Act came into operation Northern Ireland was a separate State for this purpose. The fact that the Stamp Act, 1891, has been made part of the law of Northern Ireland, so that capital duty is payable there, does not mean that section 55 applies to a company incorporated in Northern Ireland. Section 57 (5) of the Act of 1927 shows that it does not.

[They referred to *In re Midleton's Settlement.*[7]]

J. H. Stamp in the same interest. The key of section 55 lies in the initial words. It operates in cases of "reconstruction or

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[5] [1904] 2 Ch. 268, 286.

[6] (1890) 25 Q.B.D. 129.

[7] [1947] W.N. 198; 63 T.L.R. 505; [1947] 2 All E.R. 134.

"amalgamation"; that must refer to reconstruction or amalgamation under the English Companies Acts: see *Lever Bros. Ld.* v. *Inland Revenue Commissioners.*[8] In 1927 Parliament was anxious to assist schemes of rationalization of English companies and the section was passed to assist that end. Further the section must be referring to English companies only, since it would not be possible to equate the capital of a foreign company to that of an English company. It is submitted that in the context of this section the word "company" must be given the restricted meaning of company incorporated in Great Britain.

EVERSHED M.R. This appeal raises a question, put in a case stated pursuant to section 13 of the Stamp Act, 1891, whether the appellant company, the Nestlé Company, is entitled to a remission of capital duty in respect of certain increases of capital made by that company. The claim for remission of duty arises under section 55 of the Finance Act, 1927, whereby upon the issue or the increase of capital of a company for the purpose of acquiring an undertaking or the shares of another company, the transaction being what is called a "reconstruction" or an "amalgamation," certain privileges in regard to the capital duty that would otherwise be exigible are allowed. In that same section there is also a remission of the ad valorem duty on any transfers which may be executed pursuant to such an arrangement.

The Nestlé Company claims the benefit of the remission under both branches of the section, but the case stated relates only to the capital duty. The problem arising in regard to ad valorem transfer stamp duty is relevant in argument, but not otherwise, on this appeal; it is, indeed, as I understand, suggested that, if the Nestlé Company fails in this appeal as regards capital duty, it may still be entitled to a remission of ad valorem transfer duty, under section 42 of the Finance Act, 1930, on the transfers.

The facts may be very shortly stated. The Nestlé Company is a company incorporated in England under the Companies Act, 1948. We are told that its share capital is held substantially by another corporation, registered in the Republic of Panama. The operation, which has given rise to the present question, is this: In March, 1951, the Nestlé Company took steps to acquire the whole of the share capital of four other companies. Two of the four companies, Nesmilk Ld. and Nesfood Ld., are English companies,

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[8] [1938] 2 K.B. 518.

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that is to say, companies incorporated in England under the relevant English Companies Act; the other two, Nestlé Food Products (Northern Ireland) Ld., and Ulster Farm Products Ld., as their names imply, are limited companies formed pursuant to the Companies Act (Northern Ireland), 1932. As a consequence of the Government of Ireland Act, 1920, and other steps taken pursuant thereto, the Parliament of Northern Ireland has exclusive jurisdiction as regards the regulation of joint stock companies within the confines of Northern Ireland, so that the English Companies Act, 1948, under which the Nestlé Company was incorporated, does not apply at all to Northern Ireland. The increase of the share capital, which was requisite to acquire the shares of these four companies, amounted to £3,410,000, of which the greater part is attributable to the two English companies. That, however, is merely incidental.

I can pass now to the argument presented to us and to a consideration, so far as it is relevant, of the statutory provisions which are applicable. Danckwerts J. decided adversely to the claim of the Nestlé Company, and this appeal is from that adverse decision. That which is called capital duty, duty on the capital of companies, is specified in sections 112 and 113 of the Stamp Act, 1891. Such duty first came into existence a little earlier, in the Customs and Inland Revenue Act, 1888. For present purposes it is sufficient to look at sections 112 and 113 of the Act of 1891. [His Lordship read the relevant portions of the sections and continued:]

It followed, therefore, from those sections, that in the case of a company which increased its capital, say, by £3,000,000, to acquire all the shares in a number of other companies, that company would have to pay duty on the whole of that increased share capital; and for reasons which Mr. Stamp no doubt quite rightly attributes to an inclination towards what was called "rationalization" in those days, Parliament in 1927 thought it proper to grant some indulgence in cases of that kind. There therefore came to be enacted section 55 of the Finance Act, 1927. That section is but one of the sections of the Finance Act, 1927, which dealt with a number of other tax matters, as is common in these enactments. It is found in Part IV of that Act, beginning with section 48, which is headed "Miscellaneous and "General." There is nothing before section 55 in any way related to the Stamp Act, 1891. The section opens with these words, in subsection (1): "If in connexion with a scheme for the reconstruction of any company or companies or the amalgamation of "any companies it is shown to the satisfaction of the Commissioners of Inland Revenue that there exist the following "conditions, that is to say—." Before I look at the conditions, it is plain that the first duty of the court is to decide what is meant by that use of the word "company" which appears unheralded in any way in this part of this Act of 1927.

The word "company" is a common English word and it means, among other things, "a collection of persons or "individuals." It is obvious that the word in this context cannot mean that. It is, however, the burden of the argument for the Nestlé Company that it means or covers any corporation or persona ficta, which, by analogy to an English joint stock company or otherwise, might fairly be described in an ordinary context as a "company." I am unable to accept that argument. I think that when the general purpose of this section is borne in mind you are inevitably carried back to sections 112 and 113 of the Stamp Act, 1891, to see what sort of creature it is that Parliament is referring to in section 55 of the Finance Act, 1927, as a "company." You must, in other words, give a restricted and technical meaning to this word "company"; and, in order that I may state at once what my conclusion is, I think that the inevitable meaning, in this context, of the word "company" is a body corporate of the kind indicated in sections 112 and 113 of the Stamp Act, 1891, that is to say, a body corporate incorporated under letters patent of Her Majesty or according to the laws general or special of Great Britain—and I mean by Great Britain, England, Wales and Scotland. When the Stamp Act, 1891, was passed, Parliament at Westminster had jurisdiction both as regards stamp duty and joint stock companies over Ireland as well; so that "company" in that Act would include an Irish company. But following the Government of Ireland Act, 1920, the power to legislate as regards both stamp duty and joint stock companies for Northern Ireland was transferred to the Northern Ireland Parliament. "Company," therefore, in section 55 (1) of the Finance Act, 1927, means, in my judgment, an English or Scottish "company" only.

Reverting to section 55, Mr. Grant says—and, if I may say so, says quite rightly—that the conditions for qualification for benefit under this section are those stated in paragraphs (*a*), (*b*) and (*c*) of subsection (1) immediately following the words which I have read. The first, (*a*), reads: "that a company with limited "liability is to be registered, or that since the commencement of "this Act a company has been incorporated by letters patent or "Act of Parliament, or the nominal share capital of a company has "been increased." He says that no problem arises as to the satisfaction of that condition, because the nominal share capital of a company, which admittedly on any view is within this section, namely, the Nestlé Company, has been increased. Then paragraph (*b*) reads: "that the company (in this section referred to as "'the transferee company')"—that is to say, the company referred to in (*a*)—"is to be registered or has been incorporated or "has increased its capital with a view to the acquisition either of "the undertaking of, or of not less than ninety per cent. of the "issued share capital of, any particular existing company." Again Mr. Grant says that that also is satisfied, because the £3,410,000 of additional share capital of the Nestlé Company has been created with a view to the acquisition of the whole of the issued share capital of four particular existing companies. Paragraph (*c*) reads: "that the consideration for the acquisition (except such "part thereof as consists in the transfer to or discharge by the "transferee company of liabilities of the existing company) "consists as to not less than ninety per cent. thereof . . . (ii) "where shares are to be acquired, in the issue of shares in the "transferee company to the holders of shares in the existing "company in exchange for the shares held by them in the "existing company."

Those are the three conditions; and the third follows from the second in this case, that is to say, if the four companies which are mentioned, Nesmilk Ld., Nesfood Ld., Nestlé Food Products (Northern Ireland) Ld., and Ulster Farm Products Ld., are all "particular existing companies," then (*b*) and (*c*) are both satisfied. The argument necessarily involves this, that a particular existing company need not be a company registered in Great Britain, that is, England or Scotland; and Mr. Grant says that there is nothing in the language which I have read which indicates any such local requirement. Mr. Grant admits that what is called the transferee company (the Nestlé Company here) must be an English or a Scottish company, and that, indeed, necessarily follows from the fact that we are here dealing with a remission of English stamp duty. But whatever, he says, may be said as to the characteristics of the transferee company, there is nothing which compels or requires, according to the ordinary sense of language, any limitation to be put on the "particular "existing company."

I have been unable to agree with that argument. On the side of the Crown it was suggested that the real test lay in the consideration of the opening words, " scheme for the reconstruction of any company . . . or the amalgamation of any " companies." I confess that I have not been able to derive the assistance from that consideration that Mr. Pennycuick and Mr. Stamp urged. For one thing, I should have thought it plain that, whether these two Irish companies were " particular existing companies " or not, the purchase or acquisition of all the shares in them indubitably was part of a scheme of amalgamation. But, as I have already indicated, it seems to me that the clue is to be found by considering to what this word " company " is intended to refer in this context. If, as I think, after reference to the Stamp Act, 1891, " company " means a company registered in accordance with the laws of Great Britain, at least as regards the transferee company, then I can see no possible or sensible reason for suggesting that the meaning is different when applied to the " particular existing company."

I have read the opening lines of paragraph (*a*), " a company " with limited liability is to be registered." What does " registered " mean? I suggest that, in its context and looking back at the Stamp Act, 1891, that means registered by the Registrar-General of Joint Stock Companies. When the Act of 1927 was passed, the first benefit, the extent of the remission of capital duty, which is set forth in the paragraph following the statement of conditions in subsection (1), and introduced with the capital letter (A), was stated thus: " (i) an amount equal " to the amount of the share capital of the existing company in " respect of which stamp duty has been paid."

Three years later there was an amendment of that paragraph of a rather unusual nature. The difficulty to which the phrase that I have quoted gave rise was twofold. In the first place, stamp duty, that is capital duty of this nature, was first imposed in the year 1888. You might, therefore, have an existing company, the whole of whose share capital had been issued before 1888 and in respect, therefore, of which no duty had ever been paid. The original form of words would exclude from benefit the acquisition of the shares of such a company. Furthermore, it was quite likely that one amalgamation or reconstruction would follow another, and, if a company had once issued capital and had been granted relief in respect of that issue under this section, and was afterwards itself acquired, this form of words would again, quoad that share capital, deprive the transferee company of the benefit because, ex concessis, no stamp duty had been paid, having been remitted under this section. Parliament, therefore, took the rather unusual course of providing, first, that, to the words which I have read, " in respect of which stamp duty has been " paid," there should be deemed to have been added " or relief " has been allowed under the provisions of this section "; and, secondly, that from the date of the passing of the Finance Act, 1930, neither the original qualification nor the one deemed to have been added should persist; in other words, from 1930, the paragraph would read, simpliciter, " an amount equal to the share " capital of the existing company," without any qualification whatever.

I have explained, at a little length, the nature of that amendment in order to make clear the extent to which legitimate use can be made of the words which originally were in the paragraph. I think it is legitimate to have regard to the form which the paragraph originally took, as showing that not only the transferee company, but the existing company also were thought of as companies in respect of which this capital duty would have been, or at least might have been, leviable, a circumstance which would only come about in the case of a company incorporated under the local law of this country.

Now, Mr. Grant says, assuming all that against him, still it does not in any case affect his claim for relief from capital or ad valorem transfer duty. We have, he says, to take these sections and these paragraphs as we now find them and construe them according to their natural language. The question is, therefore, whether any particular case does or does not fit itself within the exact conditions set out for relief. I come back again to what I think is the main premise on which the whole of the argument on this section must rest: what is meant by the word " company " in the opening two lines of the section? And so far from leading me to a contrary conclusion, the few references —and I have not attempted an exhaustive analysis of the section —support the view which I have formed, that " company " means a company registered according to the local laws of England or Scotland. Now, if that is so, it is, of course, the end of this case.

But there was a subsidiary argument with which I will deal briefly, and it was this. Assuming, says Mr. Grant, that " company " cannot mean every foreign corporation which is anything like an English limited liability company (a result which would involve very great difficulties where you have to find out what is the " amount " of the share capital of such an entity), at least, it must comprehend, says Mr. Grant, a company incorporated according to the laws of Northern Ireland, particularly the Companies Act (Northern Ireland), 1932. The relevant legislative history from 1920 onwards, briefly, is this—that by the Government of Ireland Act, 1920, powers were given to the Parliament of Northern Ireland to make laws in regard to certain matters for Northern Ireland, thereby excluding for those matters the legislative powers of the Imperial Parliament at Westminster. The regulation of joint stock companies was one of them. As regards duties and taxes, certain powers were granted to levy duties and taxes (for example, stamp duty) locally in Northern Ireland, and the power of the Imperial Parliament to levy taxes which would be exigible in Northern Ireland remained in other instances; for example, income tax. These legislative powers are set out in sections 4 and 21. Furthermore, in section 69 power was granted to Her Majesty in Council to make regulations for the setting in motion of the Parliament and Government of Northern Ireland.

In pursuance of that last section, orders were made in 1922 which included the Government of Northern Ireland (Adaptation of the Taxing Acts) Order, 1922 (S.R. & O., 1922, No. 80), making the Stamp Act, 1891, an Act applicable to Northern Ireland, that is to say, making that Act, with the necessary modifications, a Northern Irish Act. The point which Mr. Grant makes, and to which I hope I have sufficiently laid the foundation, is this, that, in any case, since the Stamp Act, 1891, and therefore capital duties under it, was made applicable to and part of the law of Northern Ireland, the argument based on the reference to the duty in paragraph (A) as limiting the local characteristics of a " particular existing company " falls necessarily to the ground. I do not think that that is a sound argument. I do not think that the mere fact that the English Stamp Act, 1891, became, mutatis mutandis, part of the local law of Northern Ireland has the consequence that any Northern Ireland company can be treated as an " existing company," because capital duty under the old Stamp Act, translated into Northern Irish enacted law, is exigible in regard to such a company. I think that there are indications that, when dealing with stamp duty in the Act of 1927, Parliament did not intend to relate it to Northern Ireland at all. Section 57 (5) of the Finance

Act, 1927, provides: "Such of the provisions as relate to matters "with respect to which the Parliament of Northern Ireland has "power to make laws shall not extend to Northern Ireland." Stamp duty is one of them. In any case, once the view is taken that the word "company" in section 55 means a company incorporated according to the local laws of England and Scotland, or, put another way, excludes any company or corporation which is incorporated according to the laws of a part of the world, whether a Dominion in the British Commonwealth or not, which has exclusive legislative power to make laws regulating such matters—once that conclusion is reached, the question of the local application to Northern Ireland of the Stamp Act, 1891, ceases in my judgment to have any real significance.

Having reached the view which I have reached as to the meaning of this word "company," I think that Danckwerts J. rightly concluded the question raised in the case stated, and that this appeal must be dismissed accordingly.

Jenkins L.J. I agree. The first argument presented to us on the part of the Nestlé company was to the effect that the words "particular existing company" in section 55 of the Finance Act, 1927, according to their ordinary construction, were apt to include a corporate body deriving its incorporation from the laws of any part of the world; and that there was no justification for confining the expression to companies incorporated under the laws of the United Kingdom or under the laws of any particular part of the United Kingdom, as distinct from companies incorporated in foreign States. It was agreed that so far as capital duty was concerned—capital duty being the sole duty in issue in this appeal—a particular existing foreign company would have to qualify for relief in other respects, that is to say, it would have to be a company the interest of whose corporators was measured by means of some form of capital capable of being equated to the share capital of a company incorporated in this country. But, it was said, difficulties of that kind afforded no sufficient reason for curtailing the natural meaning of the words "particular existing company." It was pointed out further that, whatever might be said of the provisions of section 55 of the Act as pointing, in relation to capital duty, to companies incorporated here, no such complication arose so far as the relief from transfer duty was concerned, the relevant matter as regards transfer duty being merely the transfer of shares or other property from one person to another, the character of the incorporation and internal arrangements of any company involved in the transaction being immaterial.

I find myself unable to accept that argument. Section 55 of the Finance Act, 1927, is an enactment passed by the Parliament of the United Kingdom for the purpose of giving relief to certain companies fulfilling the conditions stated from the duty on the capital of companies imposed by an enactment of a similar character, that is to say, the Stamp Act, 1891. One would expect, therefore, that section 55, addressed as it is to that subject-matter, would be concerned, and concerned only, with companies of the same kind, that is to say, companies incorporated under the general law of the United Kingdom. One must rightly, I think, in those circumstances, approach section 55 with a strong bias towards the view that the companies referred to, whether they be transferee companies or particular existing companies, are companies within the meaning of the law of this country, and as such are companies which, save in so far as they may have been exempted from it by the date of their incorporation, or relieved from it by some previous application of the provisions of section 55, are amenable to the provisions of sections 112 and 113 of the Stamp Act, 1891, as regards stamp duty on their capital.

In my judgment, that prima facie view is clearly borne out when one comes to consider the details of the section itself. First of all, there is no doubt that a transferee company must be a company incorporated according to the laws of this country. That, to my mind, supports the view that, comparing like with like, the other party to the amalgamation or reconstruction contemplated by section 55 must be a company of a similar kind.

Then there is the reference to the share capital of the particular existing company. Share capital is a conception well understood and established in English company law, but, so far as the company law of foreign countries is concerned, the possible methods of measuring the interests of corporators are many and various. Indeed, I understand it to be the case that companies under the law of some countries may have capital consisting of or including shares "of no par value." It would seem, therefore, that any attempt to extend section 55 to cases of companies, other than companies incorporated under the laws of this country, would be fraught with difficulty. It should be remembered that under paragraph (A) of section 55 (1): "The nominal share "capital of the transferee company, or the amount by which the "capital of the transferee company has been increased, as the "case may be, shall, for the purpose of computing the stamp "duty chargeable in respect of that capital, be treated as being "reduced by either—(i) an amount equal to the amount of the "share capital of the existing company. . . ." Pausing there, it is plain that if the benefits of the section were thrown open to particular existing companies incorporated in foreign parts, the calculation postulated by paragraph (A) might well be impossible of performance. No doubt it might be possible in some cases—in those, for instance, of companies incorporated in countries which have adopted the principles of the English Companies Acts, such as Australia and India. But the fact that no difficulty would arise in applying the provisions of the section to some foreign companies does not advance the Nestlé Company's argument on construction to any degree, for one must accept the position that on this construction the "particular existing company" may be a company incorporated in any part of the world; and even if it were possible to apply the terms of the section to sociétés anonymes in France, and I know not what other forms of corporation or quasi-corporation in other European countries, or to American corporations with shares of no par value—even if the division of the capital of a given foreign company could be equated to the share capital of the transferee company—there would remain, I should have thought, almost insuperable difficulties of calculation in matters of exchange and so forth.

I think that these considerations afford strong reasons for limiting the meaning of the words "particular existing com-"pany" in the way contended for by the Revenue. But the matter does not rest there, for under section 55, as originally framed, paragraph (A) (i) went on from the point down to which I have already read it with the words, "in respect of which "stamp duty has been paid." Now that language, to my mind, said in so many words that the section was only concerned with cases in which the particular existing company was a company amenable to the provisions of sections 112 or 113 of the Stamp Act, 1891. Those words were repealed by the Finance Act, 1930, which, as from the commencement of that Act, caused the provision in question to have effect as if the words "in respect of "which stamp duty has been paid" were not contained therein, and provided further that the provision should be deemed to have effect up to the commencement of the Act of 1930 as if, after the said words, there had been inserted the words "or relief has "been allowed under the provisions of this section." Legitimate use has been made of that amendment in support of the Nestlé

Company's argument to suggest that, as from the date when the amendment took effect, section 55, whatever its previous scope may have been, was enlarged in its application so as to include all the heterogeneous tribe of foreign corporations. I cannot, for my part, accept the view that this amendment caused, as it were by a side wind, so fundamental an alteration in the scope of section 55. To my mind, it is amply satisfied by the consideration that companies incorporated before 1888, that is to say, before the date when the Customs and Inland Revenue Act of that year introduced duty on the capital of companies, were not liable for that duty on their share capital created prior to that date, and that it may have been thought unfair that those companies should not participate in the benefit of the exemption for which they would otherwise have qualified. It is satisfied also by the further consideration that it was obviously unreasonable that a company should not be entitled to the benefit of the exemption with respect to the capital of a particular existing company which had secured relief from capital duty by some previous application of the benefits of section 55.

Accordingly, in the view I take, the judge came to a right conclusion in holding, as he did, that section 55 did not extend to foreign companies, that is to say, did not extend to companies other than companies incorporated under the laws of the United Kingdom—if I might use that expression without prejudice to the special considerations raised as regards Northern Ireland by the provisions of the Government of Ireland Act, 1920.

But, says Mr. Grant, for the Nestlé Company, let section 55 be construed in the narrow sense put upon it by the judge; nevertheless, the Nestlé Company is entitled to succeed as regards its acquisition of the shares of the two companies incorporated in Northern Ireland, because the Government of Ireland Act, 1920, and the Order in Council made thereunder in regard to stamp duty had the effect of qualifying those two companies, even under section 55 as originally framed, as particular existing companies in respect of whose share capital stamp duty had been paid. I cannot accept that proposition. It seems to me that the effect of the Government of Ireland Act, 1920, so far as material for the purposes of the argument which I am now stating, was this. Stamp duty was one of the matters on which the Government of Northern Ireland was given power to legislate; and in the meantime, the Order in Council to which we have been referred, adapted the provisions of the Stamp Act, 1891, to Northern Ireland as part of the local law of that country. It is further to be observed, as my Lord has already pointed out, that section 57 (5) of the Finance Act, 1927, that is to say, the Act which contains the exempting section 55, provides that "Such of the provisions as "relate to matters with respect to which the Parliament of "Northern Ireland has power to make laws shall not extend to "Northern Ireland." The precise effect of that provision is perhaps open to debate, but at all events, to my mind it means, and must mean this, that inasmuch as section 55 deals with a matter, namely, stamp duty, which is a matter with respect to which the Parliament of Northern Ireland has power to make laws, references in section 55 to stamp duty do not include stamp duty exigible under the local law of Northern Ireland.

Therefore, construing section 55 as it originally stood, that is to say, including the words "in respect of which stamp duty has "been paid," it seems to me difficult to hold that a Northern Ireland company could qualify for the exemption. But the case does not rest there, for another of the matters upon which the Parliament of Northern Ireland was given legislative power under the Act of 1920 was the matter of companies, and pursuant to that power the Parliament of Northern Ireland passed the Companies Act (Northern Ireland), 1932, under which the two allegedly particular existing companies were incorporated. I agree with the judge that, as these two companies are companies owing their corporate existence to the local law of Northern Ireland, they are not companies within the meaning of section 55; for that section, in the view which I take, applies only to companies incorporated under the general law of the United Kingdom, and companies incorporated in Northern Ireland under laws enacted pursuant to the separate powers of legislation conferred on the Parliament of that country do not answer that description.

I would, therefore, reach the conclusion on the whole case that the particular existing company in section 55, having regard to the Government of Ireland Act and its effect on the legislative position of Northern Ireland, means a company incorporated under the laws of Great Britain, that is to say, the laws applicable to England, Wales and Scotland.

I should add, perhaps, in conclusion, that, as my Lord has said, the question of transfer duty arises in this appeal only as a matter of argument. In my judgment, the argument founded on that aspect of section 55 carries the case no further; the problem is to discover, on a true construction of the section, what is meant by the phrase " particular existing company " and to follow that construction wherever it leads. It is nihil ad rem to say that " particular existing company " ought to be given some other meaning, because, if given that meaning, it will cause no difficulty in the application of one particular provision of the section.

For these reasons I agree with my Lord that the judge came to a right conclusion and that this appeal fails and should be dismissed.

HODSON L.J. I also agree. The Nestlé Company claims relief from capital duty imposed by section 112 of the Stamp Act, 1891, upon companies, the relief being granted under section 55 of the Act of 1927, which has modified the rigours of the first-mentioned Act. The Nestlé Company has increased its capital with a view to the acquisition of the share capital of four companies, in respect of two of which no question arises. The two remaining companies, whose share capital has been acquired, were incorporated under the laws of Northern Ireland. The relief has been refused because the words " particular existing company " in section 55 (1) (*b*) of the Act of 1927 have been held not to cover such companies. The Nestlé Company's main argument is a simple one, namely, that there is no definition of " company " in the Act of 1927, and therefore there was no reason why the word should not include any corporation in the world which can be said to answer the description of a company, in the sense in which that word is used in the Companies Acts. It is said that, if it had been intended to limit the relief to English and Scottish companies, the statute could, and would, have so stated in clear terms.

The answer to this argument is, I think, contained in the Finance Act, 1927, itself, and in the Stamp Act, 1891, which imposed the duty, or rather reimposed it, since the duty was first imposed by the Customs and Inland Revenue Act, 1888. I think that one expects to find in legislation of a fiscal character that the word " company " is intended to include companies subject to the laws of this country and not foreign countries. Sections 112 and 113 of the Stamp Act, 1891, which are sections imposing the duty, clearly do not apply to companies outside the United Kingdom, and in section 55 of the Act of 1927, where the word " company " is applied to a transferee company, that is to say, a company which is entitled to relief from duty, it clearly refers only to companies within the United Kingdom, and the context would at least suggest, therefore, that the " particular existing " company " in the section should be the same kind of company.

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This is more apparent, when one regards the scheme propounded by the initial words of the section, which begins with these words: "If in connexion with a scheme for the reconstruction of "any company or companies or the amalgamation of any com- "panies it is shown to the satisfaction of the Commissioners of "Inland Revenue that there exist the following conditions"; then the section indicates the subject-matter of the scheme as consisting of companies subject to United Kingdom taxation. If that were otherwise, there would apparently be the consequence that prima facie at any rate, the benefits of relief would be given in respect of the reconstruction or amalgamation of world companies, whereas the legislature of this country would be expected to facilitate the reconstruction or the amalgamation of particular British companies.

The difficulties of working the section on the construction contended for are illustrated by reference to that part of the section beginning (A): "The nominal share capital of the trans- "feree company, or the amount by which the capital of the "transferee company has been increased, as the case may be, "shall, for the purpose of computing the stamp duty chargeable "in respect of that capital, be treated as being reduced by either "—(i) an amount equal to the amount of the share capital of the "existing company in respect of which stamp duty has been "paid, or, in the case of the acquisition of a part of an under- "taking, equal to such proportion of the said share capital as "the value of that part of the undertaking bears to the whole "value of the undertaking," and so on. These difficulties would indeed be great, if not insuperable, in cases where shares of foreign companies were being acquired, and an attempt would have to be made to deduct the capital of the foreign company from the nominal capital of the transferee company, without any guidance as to rates of exchange in some cases, and in other cases, where the shares of the foreign company had no par value, without any accurate standard of comparison at all.

The judge laid stress on the language of that part of section 55 following (A) which I have just read, and which is followed by the words "in respect of which stamp duty has been paid." He read that part of the section and added these words [1]: "There "is an indication that some stamp duty which has been imposed "is to be reduced by something which is covered by these words: "'an amount equal to the amount of the share capital of the

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[1] [1952] 1 All E.R. 1388, 1393.

" 'existing company in respect of which stamp duty has been " 'paid.' . . . It seems to me that, as originally drafted, it is " plain the legislature had in mind a company the shares of " which were being taken over in respect of which stamp duty " had already been paid, and the object of the exemption was to " prevent stamp duty being levied anew when there was merely " an increase of capital for the purpose of the acquisition of " existing shares."

The words " in respect of which stamp duty has been paid " were removed from the section by a later Act of 1930, but this does not affect the argument based on the language of the section as it originally stood.

Mr. Grant contends that this reasoning is fallacious, since, if I understand him correctly, this part of the section only deals with circumstances in which the company claiming relief was qualified for relief, and that the fact that the company could not satisfy the definition entitling it to claim does not affect the construction of the words first used, namely, the words, " particular existing company." I do not agree with this contention. I agree with the judge that the language supports a limited construction of the words " particular existing companies "; it shows that what is contemplated is an existing company which has paid stamp duty and is accordingly a United Kingdom company. The section as a whole is not, I think, naturally to be read as, in the first place, including all companies by the words " particular existing companies," and, in the second place, providing a scheme for, so to speak, analysing the position to see whether or not a particular company is inside or outside. I would, therefore, reject the wide construction of the words " particular existing company " contended for by the Nestlé Company and adopt the narrower construction, which would exclude the two companies incorporated in Northern Ireland, since at the time the Finance Act, 1927, was passed the Government of Ireland Act, 1920, had come into operation, and Northern Ireland had for this purpose been constituted as a separate country.

The second argument put forward by the Nestlé Company is that if it is wrong in its first contention, then " particular existing company " means a " particular existing company liable " to stamp duty." The two companies in this respect are liable to stamp duty since the Stamp Act, 1891, is still in operation in Northern Ireland, and accordingly, it is said, they are within

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the section. I think that the short answer to this argument is that the words "particular existing company" are not to be construed as equivalent to "a particular existing company which "is liable to stamp duty." The Stamp Act, 1891, continues in force in Northern Ireland, but it continues as part of its own legislation, and the word "company" in the Act of 1927 is confined, therefore, to United Kingdom companies, excluding Northern Ireland. These are the only companies contemplated by the opening language which governs section 55 of the Finance Act, 1927.

Appeal dismissed.

Solicitors: *McKenna & Co.; Solicitor of Inland Revenue.*

B. A. B.

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Roxburgh J.

In re THOMSON SETTLEMENT TRUSTS. ROBERTSON *v.* MAKEPEACE.

[1952 T. 2389.]

Settlement—Hotchpot—Life interests—No valuation when life interests fell into possession—Subsequent death of one tenant for life—Method of valuation—Whether interest payable in respect of interests brought into hotchpot.

The donee of a power of appointment given by a marriage settlement exercised the power by a will, which appointed life interests in the settled funds to three of his daughters and three of his granddaughters, and made certain other appointments. The settlement provided that any appointee who should become entitled to any part of the settled funds in default of appointment should bring his or her appointed share into hotchpot. The appointments took effect on the death of the appointor in 1933. No valuation was then made of the life interests. In 1953 it was held that the appointments made, other than the life interests, were invalid, with the result that certain interests under the settlement passed, in default of appointment, to the tenants for life, and the provision for hotchpot had to be applied.

At the hearing of a summons it was contended for the estate of a tenant for life, who had died in 1941, that her life interest ought to be valued for hotchpot purposes on the footing of the known fact that she had enjoyed it for eight years only, and not on the basis of an actuarial calculation of its value in 1933. It was further contended on behalf of certain beneficiaries interested only in default

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of appointment that the sums brought into hotchpot ought to bear interest until the date or dates of distribution:—

Held, (1) that the proper basis of valuation of the life interests of the beneficiaries for hotchpot purposes was an actuarial valuation based on their respective expectations of life when their interests fell into possession in 1933, irrespective of the actual period of survival.

In re Heathcote [1891] W.N. 10; *In re Westropp* (1903) 37 Ir.L.T. 183 (cited [1921] 1 Ch. 541), and *In re North Settled Estates* [1946] Ch. 13 applied; *In re West* [1921] 1 Ch. 533; 37 T.L.R. 433 considered.

(2) That the sums brought into hotchpot ought not to bear interest.

ADJOURNED SUMMONS.

By a settlement dated July 12, 1875, made in consideration of an intended marriage which was afterwards solemnized, between John Millar Thomson and Louisa Aikin, it was declared that the trustees should, after the death of the survivor of the husband and the wife, stand possessed of the trust fund for such of the children or remoter issue of the said marriage (such remoter issue to be born during the lives of the husband and wife or the survivor) at such age or time not being earlier than 21 years or date of marriage, if more than one in such shares and with such future and executory or other trusts for the benefit of the said children and issue or some or one of them as the husband and wife should by deed jointly appoint; and in default of such appointment as the survivor should in like manner by will or codicil appoint; and in default of such appointment, in trust for all the children or any the child of the marriage who being a son should attain 21, or being a daughter should attain that age or marry, and if more than one in equal shares; provided always that no child who or whose issue should take any part of the trust property under any appointment should in default of appointment to the contrary have or be entitled to any share of the unappointed part of such trust property without bringing the share or shares appointed to him or her or to his or her issue into hotchpot, and accounting for the same accordingly.

The wife died in 1899. The husband, who died on March 22, 1933, exercised the power of appointment by his will, dated March 23, 1931, at which date four children of the marriage were surviving, the fifth, a son, having died without issue in 1904. The husband directed in exercise of the power of appointment that the trustees were to hold the trust funds "upon trust to divide "the same into four equal shares and to hold one of such shares "for my daughter Nina Catherine Makepeace, one other of such "shares for my daughter Elinor Juliet Robertson, another of "such shares for my daughter Edith Thomson, and the remaining "of such shares for my granddaughters Louisa Thomson, Elizabeth Thomson and Nina Thomson the daughters of my son Allen "Bernard Thomson, in equal shares for their respective lives on "their attaining the age of 21 years; and after the death of either "of them my daughters and granddaughters to hold their respective shares upon trust for their respective child or children as "shall be born in my lifetime or within 21 years after my death, "and if more than one in equal shares, and on the death of either "of them without leaving a child or children who shall live to "attain the age of 21 years to hold the share of the daughter or "granddaughter so dying for the survivors of them my daughters "and granddaughters in equal shares, but the share of any surviving granddaughters together shall be treated as one share "and the same to be divided between them equally such accruing "shares to be held upon the like trusts as are herein declared "concerning the original shares of my daughters and granddaughters; and if all my said daughters and granddaughters "shall die without children who shall live to attain a vested "interest under the appointment herein contained, then the "settled funds shall be held for such person or persons as the "survivor of my two daughters Nina Catherine Makepeace and "Elinor Juliet Robertson shall by her will or codicil appoint."

At the death of the settlor the surviving children were (i) Nina Catherine Makepeace, the first defendant, who had no issue; (ii) the plaintiff trustee, Elinor Juliet Robertson, a feme sole; (iii) Allen Bernard Thomson, who died on November 14, 1936, and had three children born in the settlor's lifetime, namely, (a) Sara Louisa Ford, the third defendant; (b) Elizabeth Alice Thomson, the fourth defendant (neither of whom had issue) and (c) Nina Wood, who died in 1950 leaving issue the fifth defendant Sarah Elizabeth Wood, born in 1935; his estate was represented by his widow, the second defendant; (iv) Edith Thomson, who died a spinster in 1941; her estate was represented by the first defendant. The daughters and granddaughters named in the appointment had all attained full age at the death of the settlor.

Until the death of Edith Thomson the trustees distributed the income of the trust property in accordance with the provisions of the will. Thereafter, until the death of Nina Wood, they paid one-third of the income to Nina Catherine Makepeace, one-third to the plaintiff and one-ninth each to Sara Louisa Ford, Elizabeth Alice Thomson and Nina Wood. Thereafter they accumulated the income of one-ninth on behalf of Sarah Elizabeth Wood and made payments out of the income and accumulations for her benefit.

Doubts having arisen as to whether such distribution was proper, a summons was taken out for the determination of various questions. In answering the first question (which does not call for a report) Roxburgh J. held that the appointments made by the will were valid only in respect of the life interests appointed to the daughters and granddaughters, and were otherwise wholly invalid, with the result that (a) the remaining interest in the settlement funds passed under the gift in default of appointment, and (b) the life interests of the daughters and granddaughters had to be brought into hotchpot.

The summons further asked: (2) how such interests ought to be valued for the purpose of the hotchpot provisions in the case of (a) such of the appointees for life as now survived, and (b) such of the appointees for life as survived the settlor but had since died; (3) whether the value of the life interests so ascertained ought to be brought into hotchpot with interest at 4 per cent. (or some other rate) as from the death of the settlor (or some other and what date) in the distribution of the respective parts of the funds subject to the trusts of the settlement which from time to time became distributable under the trusts in default of appointment.

Under question (2), it was contended for the estate of Edith Thomson that the value of her life interest ought not to be assessed actuarially on the basis of her expectation of life in 1933, but should be assessed on the basis of the fact now known that she enjoyed that interest for eight years only. Under question (3), it was contended for the estates of the deceased sons that the sums brought into hotchpot ought to bear interest.

A. J. Belsham for the plaintiff trustee.

C. D. Myles for the first defendant, who also represented the estate of Edith Thomson. On the question of valuation of Edith's life interest, no doubt this and the other life interests should have been valued in 1933, when they came into possession, on an actuarial valuation of the prospective life; but the necessity for that was not realized at the time. *In re Heathcote* [1] shows that when all the life tenants are alive any beneficiary can claim to have a prospective valuation made on an actuarial basis of the life interests, taken as at the date when they fall into possession; but in that case all the life tenants were alive, and it does not deal with the position when a valuation has to be made ex post facto after one of the tenants for life has died.

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[1] [1891] W.N. 10.

When the valuation is made after the death of a tenant for life, her share should be valued on the basis of the ascertained fact of the actual duration of her life interest: *In re West.*[2] *In re Westropp*[3] was a case in the Irish Land Court, and is not binding; it was the subject of criticism in *In re West.*[2] The observations of Evershed J. in *In re North Settled Estates*,[4] that it would be wrong to take into account, in making a valuation for hotchpot purposes, matters occurring after the material date, were obiter only.

The problem here is not one of substantive law, but of administration, and it should be decided in the light of events which have happened. If Edith's share is to be valued as at 1933, her estate will have to bring into hotchpot a sum greater than that which she actually received in the nine years during which she enjoyed her life interest.

[ROXBURGH J. If your contention is right, it means that the quantum of the beneficial interests will vary according to whether an application for valuation is made promptly or late. That seems to be unfair, and undesirable in principle.]

It is the principle applied in *In re Bradberry*[5] and other cases relating to annuities, and it is submitted that it should be applied here.

On the question whether there should be interest on the sums brought into hotchpot, there is no authority for such a proceeding, and it is submitted interest is quite inapplicable to such gifts.

B. G. Burnett-Hall for the widow of Allen Bernard Thomson, also representing the estate of the son who predeceased the settlor. On the main question, it is submitted that it is implicit in *In re Heathcote*[6] that actuarial valuations ought to be made when the life interests fall into possession, and that effect should be given to the view of Evershed J. in *In re North Settled Estates.*[7]

On the question of interest, there is no direct authority. The matter is referred to in Farwell on Powers, 3rd ed., at p. 422, but the passage is not dealing with life interests, but with cases of advancement. When a life interest is actuarially valued at the date when it falls into possession, the gift is the equivalent of the gift of a capital sum at that date of an amount ascertained by the actuarial valuation, and as such should bear interest.

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[2] [1921] 1 Ch. 533; 37 T.L.R. 433.

[3] (1903) 37 Ir.L.T. (cited [1921] 1 Ch. 541).

[4] [1946] Ch. 13, 16.

[5] [1943] Ch. 35; 59 T.L.R. 131.

[6] [1891] W.N. 10.

[7] [1946] Ch. 13, 16.

H. E. Francis for the granddaughters and great-granddaughter.

Roxburgh J. This case raises an important question of principle. The settlor's daughter Edith has to bring a life interest into hotchpot in order to comply with the hotchpot provisions of the will. The last tenant for life died on March 22, 1933; and there is no doubt that any beneficiary would have been entitled to come to the court at that date and claim to have the hotchpot provisions worked out in order that the interests of the beneficiaries might be ascertained; but nobody did so. Edith died in March, 1941. It now becomes necessary to work out the hotchpot provisions.

The question which I have to determine is whether for that purpose her life interest is to be valued upon the footing of events which in fact happened, because it is now known that her life interest lasted for some eight years and no longer; or whether it is to be valued in accordance with her expectation of life as at March 22, 1933, when her life interest fell into possession.

The subject has evoked a considerable conflict of authority. The first case of importance is *In re Heathcote.*[1] It is quite true that in that case all the life interests were still in being at the date when the application for valuation was made, and accordingly the point which I have to determine did not directly arise for decision; but I cannot help thinking, though the report is very short, that Kekewich J. did take the present question into account in reaching his decision; because his words, I think, show that he realized that, if the actual duration in fact of the life interests was relevant, then the valuation was premature. He said: "The life interests of the daughters must be brought "into hotchpot and at once valued. It was fair to the other "children that they should have their interests in the trust funds "immediately ascertained. The value of the life interests must "be calculated, not by reference to the duration of them, but by "an actuarial valuation of them at the time when they first took "effect, i.e., at the death of the settlor."

Pausing there, that case is plain authority for the proposition that where all the life tenants are alive, as was the case in 1933 when their interests fell into possession, any one of them could have insisted upon a valuation upon the footing of their respective expectations of life. Therefore, if a different principle is to be applied now, the result must be that the quantum of the beneficial interests is made to depend upon the accident of when some beneficiary thinks fit to apply to the court. A variation in beneficial interest upon such a basis seems to me to be unsatisfactory in principle, and this circumstance weighs with me in making my way amidst the conflicting authorities.

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[1] [1891] W.N. 10.

The next case of importance is the Irish case of *In re Westropp*,[2] decided in the Land Court by Ross J. There the very point which I have to determine did arise. The testator had died on March 2, 1866. He was the life tenant upon whose death the hotchpot provision had to operate. George, who took the life interest after his death, had died on August 16, 1888, long before the matter came before the court. Accordingly it was known exactly how long his life interest had subsisted at the time when the matter had to be decided. None the less, Ross J. said that the proper way to ascertain the value of George's estate for the purpose of hotchpot was by obtaining an actuarial calculation of the value of his life interest as at the date of the death of the appointor. At the end of his judgment he declared that George's life interest was to be valued as at the date of the appointor's death.

That is a direct authority, although not binding upon me. Astbury J. discussed that case and *In re Heathcote* [3] in *In re West*.[4] There the life interest never fell into possession at all, because the reversionary life tenant died before the first life tenant. Astbury J. decided that no value should be put upon the life interest which failed, partly as a matter of construction and partly because in his view the principle in *In re Westropp* [5] was not applicable to such a case.

It cannot possibly be said in this case that the life interest failed, because it in fact existed for eight years. Accordingly, *In re West* [6] is no decision upon such a case at all. Astbury J. did, however, criticize *In re Westropp*,[5] and his criticism was the subject-matter of comment by Evershed J. in *In re North*

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[2] 37 Ir.L.T. 183 (cited [1921] 1 Ch. 541).

[3] [1891] W.N. 10.

[4] [1921] 1 Ch. 533; 37 T.L.R. 433.

[5] 37 Ir.L.T. 183.

[6] [1921] 1 Ch. 533.

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Settled Estates.[7] In that case the remarks of Evershed J. which I am about to cite were unquestionably obiter. None the less, I attach great weight to them and, if I may so say with respect, I agree with them, except that I propose to alter the punctuation in one sentence in a manner which I am sure the judge intended. Dealing with the hotchpot cases he said[8]: "I am inclined to "think that the authorities go no further than this: that it is "proper and legitimate, when the date on which the valuation "has to be made is later than events which have in fact "happened"—deleting the comma in the Law Reports—"material to the value"—then inserting a comma here—"to "take those events into account, but prima facie it is not legiti-"mate to take into account matters of fact occurring after the "date which is the material date for valuing the life interest for "hotchpot purposes."

Mr. Myles relied upon *In re Bradberry*[9] and the line of cases relating to annuities; but there is, I think, a fundamental distinction between such cases and the hotchpot cases. Again with respect I adopt the differentiation which Evershed J. drew[10]: "It is, I think, important to bear in mind that in such "a case as *In re Bradberry*,[9] the need for making any valuation "at all and the right on the annuitant's part to have a valuation "made was not something which at any rate necessarily existed "at any prior time. On the death, for example, of the testator "it might or might not be that the estate would turn out to be "insufficient. The purpose of the valuation was not for giving "effect to the testamentary dispositions, but for doing, to the "best of the court's ability, justice between the beneficiaries at "a time when it had been discovered that the testator's bene-"factions were no longer capable of being carried exactly into "effect."

In my judgment that distinction is sound. In the present case the valuation is required in order to carry out the disposition of the settlement. The date at which it ought to be carried out is the date when the life interest fell into possession. In my judgment it would be a strange thing if a different value was put upon the life interest because of the accident that nobody came to the court to have a valuation made until the life tenant had died.

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[7] [1946] Ch. 13.

[8] Ibid. 16.

[9] [1943] Ch. 35; 59 T.L.R. 131; [1942] 2 All E.R. 629.

[10] [1946] Ch. 13, 18.

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THOMSON SETTLEMENT TRUSTS, *In re.* ROBERTSON *v.* MAKEPEACE.

Roxburgh J.

Accordingly, in my judgment the life interest must be actuarially valued as on March 22, 1933.

There remains the question whether the value of the life interests ascertained in accordance with my decision ought to be brought into hotchpot with interest.

I do not think that interest comes into this matter. Let me take the simplest illustration, which, I think, represents the essential features of the present case. Two persons are entitled in default of appointment; an appointment of a life interest is made to one of them; it is clearly settled that, when the life interest comes into possession, either of the two is entitled to have his interest quantified, and for this purpose the life interest must be prospectively valued. The effect of that transaction is this. Apart from the appointment the second of the two would be entitled to half the income and capital straight away. The effect of the appointment is to deprive him of his half of the income during the life of the appointee, but that is precisely the thing for which he received compensation by getting a larger share of the capital. He gets no income during the life of the appointee. On the other hand, on the death of the appointee he gets more than one half of the fund. It is true that it is only rough-and-ready compensation, because the life tenant may have a short life, in which case the other gains; or the life tenant may have a long life, in which case the other loses; but that is inherent in a prospective actuarial calculation. It seems to me that there can be no question of waiting until the death of the life tenant, and then considering whether some interest ought to be debited to the deceased life tenant on the footing of the actual duration of the life tenancy.

Declarations accordingly.

Solicitors: *Mackrell, Maton & Co.*

F. R. D.

LOUDON *v.* RYDER (No. 2).

[1952 L. No. 1467.]

1953
Mar. 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 25.

Harman J.

Slander of Title—Wrongful claim that certain property belonged to estate of intestate—No malice—No grant obtained by defendant when action brought—Defendant persisting in wrongful claim—Failure to obtain grant no defence—Plaintiff not entitled to damages—Declaration as to plaintiff's title—R.S.C., Ord. 25, *r.* 5.

The defendant honestly but wrongly maintained that the plaintiff was not entitled to certain property, which he (the defendant) claimed on behalf of the estate of his deceased sister who had died intestate. The defendant was the person entitled as next-of-kin to take out a grant of administration to the sister's estate, but he had not done so when the writ was issued. The plaintiff sought an injunction against the defendant, who alleged, inter alia, by way of defence that the action was premature:—

Held, (1) that this was in effect a claim of slander of title, and that the plaintiff was not entitled to damages or an injunction on that ground since the defendant's assertions, although false, were made without malice and in the honest belief that they were true.

(2) That, however, as the defendant persisted in his false assertions, the court had power under Ord. 25, rule 5, to make a declaration as to the plaintiff's title to the property notwithstanding that she was not entitled to damages; and that in order to protect her title and to prevent further proceedings relating to the same question, there would be a declaration that the defendant, as personal representative of his sister, had no right or title to the plaintiff's property.

Guaranty Trust Co. of New York v. *Hannay & Co.* [1915] 2 K.B. 536 considered.

(3) That, although a person could not bring an action as personal representative when no grant of administration had been obtained, he could not rely on his own failure to take out a grant as a defence to an action based on his wrongful claim on behalf of the intestate's estate.

ACTION.

This action was consolidated with the action of *In re Lewis' Trusts*, *Loudon* v. *Lewis*, which does not call for report; certain of the facts in that case are, however, material to the present case.

In *In re Lewis' Trusts* the plaintiff, Mrs. Diana Myrna Spencer Loudon, sued her mother, Mrs. Dorothy Spencer Lewis, in respect of certain house property held on written declarations of trust for the plaintiff; secondly, in respect of money invested in the Woolwich, Planet and Abbey National Building Societies and in National Savings Certificates standing in the plaintiff's name, but to which her mother set up a claim; and, thirdly, for a share in a sum of £30,000 under an alleged oral trust created by the plaintiff's father, now deceased.

The issue relating to the money in the building societies and the National Savings Certificates is alone relevant to the present report. Mrs. Lewis alleged that those investments were part of certain money which belonged to the estate of one Rozia Liebeskind, a Polish Jewess now deceased, and a sister of Napoleon Ryder, the defendant in the present action. Harman J. found that £12,000 belonging to Rozia Liebeskind was brought to this country in one pound notes in a suitcase and deposited with Mrs. Lewis for safe custody; but he held that Mrs. Lewis had failed to establish that the money belonging to Rozia Liebeskind, which Mrs. Lewis had mixed with her own moneys, could be traced to the investments in suit. Harman J. made a declaration that the investments were the plaintiff's, and granted an injunction against Mrs. Lewis to restrain her from asserting her title to them.

In the present action the plaintiff alleged that the defendant Ryder had fraudulently asserted a title to the shares in the building societies and to the National Savings Certificates which stood in her name, and that she had in consequence been unable to deal with those investments; and she sought an injunction to restrain him from representing that he had any interest in them.

The defendant in his defence denied the plaintiff's title to the shares, and he admitted that he had made a claim to them on behalf of the estate of Rozia Liebeskind. Alternatively he alleged that he had honestly believed and still believed the truth of these assertions.

Strangman Q.C. and *R. O. Wilberforce* for the plaintiff. The defendant wrongfully asserted his sister's title to the plaintiff's property; he must have been aware that these assertions were fraudulent. Even if the court were not to find any fraud, and that his statements were made without malice, unless the court makes a declaration as to the plaintiff's rights, she will be unable to deal freely with her own property, because the defendant persists, and will continue to persist, in his wrongful assertions. The court has jurisdiction under Ord. 25, r. 5, to make a declaration, whether or not the plaintiff is entitled to damages and an injunction: see also *Guaranty Trust Co. of New York* v. *Hannay & Co.*[1]

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[1] [1915] 2 K.B. 536.

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It is immaterial that the defendant had not taken out a grant at the date of the writ; the claim put forward by the defendant was none the less wrongful, although it was asserted before the grant. A person cannot have a better right to put forward unjustifiable claims because he delays in perfecting his own title.

Lionel Edwards Q.C. and *J. G. Monroe* for the defendant. The defendant had been told and honestly believed that these investments were made with Rozia Liebeskind's money. His assertions were made honestly and reasonably on behalf of her estate. The plaintiff has alleged fraud which is not proved, and in the absence of malice by the defendant she is not entitled to any relief in an action of slander of title, whether or not the assertions were true.

The plaintiff is not entitled to a declaration against the defendant. In the first place there should be no declaration against the defendant personally as no claim was asserted by him personally because no one has an interest in specific property forming part of an unadministered estate. Secondly, there should not be a declaration against the defendant as administrator, since he was not appointed at the date of the writ, but only since the action was brought, and a grant of administration is not restrospective: see *Ingall* v. *Moran* [2] and *Hilton* v. *Sutton Steam Laundry*.[3] The plaintiff should have waited until the grant was obtained or had someone appointed administrator ad litem.

Cur. adv. vult.

March 25. HARMAN J. reading his judgment: It follows from what I have said in the first action that the defendant is mistaken in supposing that his sister's money was invested in these securities, and that his assertions are unjustified; and the issue is whether they were honestly made or were part of a conspiracy between himself and the plaintiff's mother to deprive the plaintiff of her property.

The defendant Ryder is a Polish Jew, born in Galicia, and educated in Vienna. He lived until 1938 on the Continent, either in Rumania or in Brussels, and though he has been in this country since shortly before the war and was naturalized in 1947, he remains very much a foreigner. He is obviously an impulsive and emotional person, and has espoused Mrs. Lewis's cause wholeheartedly, and immoderately. He regards her for some reason as an ill-used person, oppressed by her daughters and morally entitled to that which they are now claiming.

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[2] [1944] K.B. 160; 60 T.L.R. 120; [1944] 1 All E.R. 97.

[3] [1946] 1 K.B. 65; [1945] 2 All E.R. 425.

So much has he thrown in his lot with his co-defendant that he allowed himself to be made her catspaw in an attempt to eject the plaintiff forcibly from her own property in May, 1951. For that piece of folly he has paid a heavy price in damages.[1] It has not deterred him, apparently, from his advocacy of Mrs. Lewis's wrongs, and he has been willing to make common cause with her in at least one other transaction concerning a property of Mrs. Lewis's second daughter, about which I will say no more than that one cannot be surprised that he is regarded with hostility by the plaintiff and her sister.

In my judgment, however, they were entirely unjustified in concluding from the fact that they never met him before 1950 that he had not known their mother for many years before. I do not doubt that he believed in the Liebeskind story, and was justified in believing it up to the time when the money reached this country. He had no reason to doubt his co-defendant's word in September, 1938, and from then onwards regarded her as, in effect, his debtor if his sister should fail, as she did, to emerge from the ghetto of Krakau.

His position was, however, a delicate one. He had no right to question the mother's transactions. He said that she did from time to time tell him that she was investing the money, and even gave him the numbers of the investments. This I take leave to doubt, though I accept his statement that it was not until comparatively recently that he knew that his sister's money was said to be entirely invested in the children's names.

[His Lordship considered certain evidence given by the defendant, and said that it could not be accepted.]

Must I, then, reject the whole of his evidence and find that he has never had any belief in the claims that he has made? I do not think so. I see no reason to suppose that he did not accept his co-defendant's story. It may be that his acceptance was careless and was due to the fact that he was an advocate of the mother against her daughters; but that he acted in an ill-considered and foolish way does not make his act fraudulent. Recklessness, as used when applied to fraud, is never the same as carelessness.

By way of additional defence it is pleaded that at the date when the writ was issued there was no personal representative of Mrs. Liebeskind in existence, and that the action was therefore premature. During the course of the action Mr. Ryder did obtain a grant of letters of administration to the estate of his sister, Mrs. Liebeskind; but I was asked to hold that the doctrine of relation back did not apply to administrators, and that the plaintiff's proper course was to have waited for a grant to be made.

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[1] [1953] 2 W.L.R. 537; [1953] 1 All E.R. 741.

I cannot accept this plea. It is, of course, the law, as pointed out, for instance, in *Ingall* v. *Moran*,[2] that a plaintiff cannot maintain an action as personal representative when it appears that no letters of administration have issued before the writ, but it does not in my judgment follow that a defendant who asserts a right as next-of-kin of a deceased person, and as being the person entitled to a grant, cannot be sued if he sets up a wrongful claim. To admit this would be to allow a defendant to take advantage of his own procrastination, which he might continue indefinitely; for the plaintiff could have no title herself to obtain a grant or the appointment of a receiver.

There remains a point of some difficulty not alluded to in the defence, but open to the defendant—namely, that an action such as this is in effect a claim of slander of title, and that the gist of that action is that the defendant should have made his claim maliciously and have thereby caused special damage to the plaintiff. The modern authority for this proposition is a case before Lord Maugham, as a judge of first instance, *Balden* v. *Shorter*.[3] The headnote reads: "An action for injurious "falsehood does not lie without proof of actual malice in the "sense of a wrongful intention to injure the plaintiff. A state-"ment false in fact, and detrimental to the plaintiff's business "though not defamatory, will therefore not support such an "action if it was made in the belief, even a careless belief, that "it was true, and without any indirect motive of hostility to the "plaintiff."

Maugham J. said[4]: "If I could properly conclude that the "story told in the witness box by Mr. Bensted was untrue "and that he knew that the plaintiff was not employed by the "defendants, I should have little difficulty in determining the "action in the plaintiff's favour because, if Mr. Bensted said "that knowing it to be untrue, I should draw the inference that "he did it from a dishonest motive and maliciously. But I

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[2] [1944] K.B. 160.
[3] [1933] Ch. 427.
[4] Ibid. 429.

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"cannot come to that conclusion. I think that he made a "careless mistake, and that it was likely that he had originally "heard that the plaintiff was contemplating taking new employ-"ment but had not heard that he had definitely obtained it and "had concluded that, having been one of the company's most "important travellers, he had been employed by the defendants.

"I am not prepared to conclude that Mr. Bensted was tel-"ling a lie when he said in the witness box that he had made "a mistake in thinking that the plaintiff was employed by the "defendants. He did make the statements alleged but made "them, at the worst, carelessly; and the only question to be "determined is whether that amounts to malice. The meaning "of 'malice' in connexion with injurious falsehood is dealt "with in Salmond on Torts, 7th ed., pp. 582–583 . . ."

Maugham J. read that passage, and he then went on[5]: "Notwithstanding Lord Davey's dictum, it is now apparently "settled that malice in the law of slander of title and other forms "of injurious falsehood means some dishonest or otherwise im-"proper motive. A bona fide assertion of title, however mistaken, "if made for the protection of one's own interest or for some "other proper purpose, is not malicious." On that ground the action failed.

This case has lately been followed by Vaisey J. and the Court of Appeal in *London Ferro-Concrete Co. Ld.* v. *Justicz.*[6] In both these cases, however, the claim was for an injunction and damages. The defence was that the defendant had made his assertions in good faith, that is without malice, and that the action would not lie. And it was so held in the earlier case. In the latter the plaintiff proved both malice and special damage and therefore succeeded. In neither case was the truth of the allegation maintained at the hearing.

Here I have negatived malice, which is tantamount to the fraud alleged in the statement of claim, and it is urged on me that the action will not lie. That I think is right in so far as it is an action for damages for slander of title.

In the present case, however, the defendant never withdrew his wrongful claim; he maintains it still, and if I dismiss the action against him he will, I suppose, continue to do so, with the result that the plaintiff will not be able, at any rate without giving an indemnity, to make herself mistress of what I have held to be her own property.

[5] [1933] Ch. 429, 430.

[6] (1951) 68 R.P.C. 65, 261.

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Is she, then, to be put to the cost of starting a new action, to be met perhaps with the same defence? I think not. The answer appears to me to lie in the provisions of Ord. 25, r. 5, which enable a declaratory judgment to be pronounced. It is in these words: " No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or " order is sought thereby, and the court may make binding " declarations of right whether any consequential relief is or " could be claimed, or not "; and this, as the Court of Appeal held in *Guaranty Trust Company of New York* v. *Hannay*,[7] is so even in a case where, apart from the rule, there would be no cause of action in the plaintiff. I read this extract from the headnote: " The court has power to make a declaration at the " instance of a plaintiff though he has no cause of action against " the defendant; and the rule so construed is merely an extension " of the practice and procedure of the court, and is not ultra " vires." This is based upon a passage in the judgment of Pickford L.J.[8] and was concurred in by Bankes L.J.

Accordingly I conceive myself entitled, with a view to quieting the plaintiff's title, and to prevent further mischief, to pronounce a judgment against the defendant Ryder, limited in form to a declaration that as personal representative of his sister he has no right, title or interest in the building society shares and in the savings certificates in the plaintiff's name. This relief was not specifically claimed in the writ, but in my judgment that does not preclude me from awarding it under the claim to further or other relief.

In view of the failure of the charge of fraud, I do not propose to award any costs against the defendant Ryder.

Judgment for the plaintiff.

Solicitors: *Hardman, Phillips & Mann; M. Landy.*

I. G. R. M.

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[7] [1915] 2 K.B. 536.

[8] Ibid. 561, 562.

1952
Oct. 2, 3,
7, 8, 9;
Nov. 19.

Vaisey J.

NORDISK INSULINLABORATORIUM *v.* GORGATE PRODUCTS LD. (SUED AS C. L. BENCARD (1934) LD.).

[1949 N. 992.]

Principal and Agent—War—Principal becoming enemy alien—Termination of agency—Goods of principal deposited in England—Goods bought by agent from Custodian of Enemy Property—Resale—Whether agent liable to account to principal for profits—Fiduciary relationship.

The plaintiffs were a Danish corporation who dealt in insulin. Shortly before the outbreak of war in 1939 they deposited a valuable stock of insulin in an English bank. When, in 1940, by reason of the invasion of Denmark by the Germans, the plaintiffs became enemy aliens, this stock vested in the Custodian of Enemy Property and was sold by him to the defendants, who before the war had acted as the plaintiffs' selling agents in the United Kingdom. The defendants, without taking delivery of the insulin, resold it at a profit, and the plaintiffs claimed that the defendants were liable to account to them for the profit which they had realized.

Vaisey J. held that the plaintiffs were entitled to an account from the defendants for the profit which they had made on the resale of the insulin; and that the defendants held that money as trustees for the plaintiffs as from the date of the writ, or the plaintiffs were entitled to it as damages for breach of trust or breach of duty.

Regal (Hastings) Ld. v. *Gulliver* [1942] 1 All E.R. 378 and *Luddy's Trustee* v. *Peard* (1886) 33 Ch.D. 500 considered.

On appeal:—

Held, by the Court of Appeal, that on the facts the defendants were not under any fiduciary duty to the plaintiffs in relation to the stock of insulin, since they had not acquired any special or secret knowledge about it which they were under a duty not to disclose, either whilst they were acting as agents or after the agency was terminated on the plaintiffs becoming enemy aliens, nor could they be regarded as trustees of the insulin, for they had, in fact, no right or interest in it; that they could not in the circumstances of the case be regarded as agents dealing with the property of their principals, or as acting in relation to the affairs of their principals, for when the sale was made the agency had terminated, and on the sale to them by the custodian the insulin became their absolute property; and that there was no recognizable equity which enabled the plaintiffs to require the defendants to account for the profit made by them, with the custodian's knowledge, on the sale and resale.

Quaere, whether, had there been a fiduciary duty, it would have been destroyed when the plaintiffs became enemies.

Decision of Vaisey J. [1952] W.N. 540; [1952] 2 T.L.R. 964; [1952] 2 All E.R. 1040, reversed.

ACTION.

The plaintiffs were a Danish corporation, and the defendants an English limited company, both of whom had, before the war of 1939 to 1945, dealt in insulin and its compounds in Denmark and the United Kingdom respectively. Before the war the defendants had acted as selling agents for the plaintiffs' "Leo" insulin (which was insulin in liquid form, suitable for supply to hospitals and doctors). Shortly before the outbreak of war in 1939 the plaintiffs deposited at certain country branches of the National Provincial Bank Ld. a valuable stock of crystallized insulin. This crystal insulin was the raw material for the liquid "Leo" insulin (though the process of conversion to liquid form was not altogether simple). One reason for the deposit being made was to guard against an interruption in supplies from Denmark to England in the event of war, and thus to guard against the business of the sale of the plaintiffs' "Leo" insulin by the defendants being brought to an end, but the deposits remained the property of the plaintiffs, and none of the crystal insulin was in any sense earmarked for conversion into liquid "Leo" for sale by the defendants in England. The defendants had assisted the plaintiffs in making the deposit in England, and in fact had originally advised that it should be made, but the plaintiffs kept control of the deposits, and even withdrew some without the knowledge of the defendants. The defendants, however, knew of the existence and location of the deposits; they had some idea of their quantity and value, and that knowledge was attributable to and derived from their business association with the plaintiffs as their selling agents.

In March, 1940, by reason of the invasion and occupation of Denmark by the Germans, the plaintiffs became "enemies" within the meaning of the Trading with the Enemy Act, 1939, and the defendants immediately took all possible steps to set in motion the appropriate procedure designed to get the crystal insulin transferred to themselves. On May 15, 1940, in exercise of the powers vested in him by the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939 (S.R. & O. 1939, No. 1198), the President of the Board of Trade made an order under the Act vesting in the Custodian of Enemy Property the right to transfer the stock of insulin, and empowering the custodian to sell it. On September 4, 1940, the custodian made a contract for the sale of the insulin to the defendants at the price of 4d. per 100 international units, being a lower price than that which had been offered by Boots Pure Drug Co. Ld. and their English associates.

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The custodian entered into the contract for sale to the defendants largely because he had been persuaded of the validity of the defendants' special or moral claim to it. Between the first approaches made by the defendants to the custodian and the making of the contract on September 4, 1940, there had been a considerable delay which apparently defeated the original plan of the defendants of setting up manufacturing equipment for conversion of the crystal insulin into liquid "Leo." and so maintaining their former business of selling "Leo" insulin to hospitals and others. By the time the sale was made the selling business had already ended and, therefore, the defendants no longer wanted the insulin for the original purpose. One Bencard, director of the defendant company, made this clear to the custodian in a letter of August 7, in which he said that he was no longer interested in the insulin for business purposes, and that if it were sold to his company it should be sold without any restrictions as to what they should do with it. On November 8, 1940, very soon after the making of the contract, and without taking delivery, the defendants subsold the insulin to Boots Pure Drug Co. Ltd., making a profit on the transaction of £3,546 5s. 6d. The custodian was aware of the subsale, and in fact he passed the insulin direct to Boots, who made out two cheques, one to the custodian for the price paid by the defendants for the insulin and the other direct to the defendants for their profit on the subsale.

The plaintiffs claimed that the defendants were bound to account to them for the profit which they had realized on the subsale, but the defendants denied that they owed any fiduciary duty to the plaintiffs which would prevent them from keeping the profit for themselves.

F. W. Beney Q.C. and *M. R. Hoare* for the plaintiffs. The plaintiffs must approbate the contract of sale but they are entitled to the profit on it. The defendants, as their agents, are in equity bound to account for that profit. It is an equitable principle that an agent must account to his principal for any profit which he makes by use of confidential information obtained by him in the course of his agency, unless full disclosure is made to the principal and the latter's assent be obtained: see *Keech* v. *Sandford*,[1] *Ex parte James*,[2] and *Regal* (*Hastings*) *Ld.* v. *Gulliver*.[3]

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[1] (1726) Sel.Cas.Ch. 61 (2nd ed. 1850).

[2] (1803) 8 Ves. 337.

[3] [1942] 1 All E.R. 378.

There is, moreover, no distinction between law and equity as regards the law of principal and agent: see *Lamb* v. *Evans*.[4]

This obligation remains after the agency has ended where an agent uses confidential information obtained by him during the course of the agency: see *Luddy's Trustee* v. *Peard*,[5] *Carter* v. *Palmer*,[6] and *Allison* v. *Clayhills*.[7]

It makes no difference that the agency here was terminated when the plaintiffs became "enemies" under the Trading with the Enemy Act, 1939. The plaintiffs' rights in the insulin were held in suspension during the war: *Hugh Stevenson & Sons Ld.* v. *A-G. für Carton-nagen-Industrie*.[8]

The defendants here made use of confidential information which they had obtained in the course of their agency, namely, knowledge of the three deposits of insulin with the English bank, the quantities and qualities of the insulin and the approximate cost of them to the plaintiffs. The defendants are accordingly, on the principles stated, liable to account to the plaintiffs.

J. G. Strangman Q.C. and *D. S. Chetwood* for the defendants. The legal propositions propounded by the plaintiffs are not disputed, but they are not applicable here. For those propositions to apply it must be shown that in order to make the purchase the defendants actually made use of confidential information obtained from the plaintiffs, and the plaintiffs have not shown any such use. The insulin deposited was not of the quality with which the defendants dealt on behalf of the plaintiffs. Although they knew of the deposit and helped to arrange it, they did not do so as agents of the plaintiffs, except possibly in a very limited sense.

Further, in order for the principles enunciated by the plaintiffs to apply it must be shown that the property in the insulin remained vested in the plaintiffs up to the time when it passed to the defendants. That was not the case here, because by the vesting order of May 15, 1940, it vested in the custodian, who transferred it to the defendants, and the custodian was not in any way acting on behalf of the plaintiffs: see *In re Münster*.[9]

The termination of the agency by the plaintiffs becoming enemy aliens made continuation of any relationship between the parties an offence, and any earlier consequences of the agency were therefore destroyed. In the circumstances the defendants

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[4] [1893] 1 Ch. 218, 229; 9 T.L.R. 87.

[5] (1886) 33 Ch.D. 500; 2 T.L.R. 841.

[6] (1842) 8 Cl. & F. 657.

[7] (1907) 97 L.T. 709.

[8] [1918] A.C. 239; 34 T.L.R. 206.

[9] [1920] 1 Ch. 268; 36 T.L.R. 173.

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owed no duty to the plaintiffs, and were entitled to buy the insulin from the custodian as if it were a purchase in the open market without being obliged to account for any profits to the plaintiffs.

F. W. Beney Q.C. in reply. *In re Münster*[9] was decided under the Trading with the Enemy Amendment Act, 1914. The language of that Act was different; here there was no order vesting the property in the custodian. It is immaterial for the application of the equitable principle in question that the property was no longer vested in the plaintiffs at the time of the sale.

Cur. adv. vult.

November 19. VAISEY J., reading his judgment, after stating the facts, said: I am satisfied on the evidence that the sum paid by the defendants to the custodian, namely, £9,623 3s. 0d., was, both in fact and to the knowledge of the defendants, less than the true value of the said stock, and I am also satisfied that the custodian accepted such sum from the defendants in preference to other offers, because he was under the impression that the plaintiffs (whose previous association with the defendants was to some extent known to him) would have approved of the sale being made to the defendants rather than to any other purchaser. Writing in 1948 (in an undated letter) the Solicitor to the Board of Trade says this: "In view of the fact that Mr. Bencard," that is to say, the defendants' managing director, "was the agent "for the owners of the insulin, and that he had been instrumental "in the creation of the stocks in this country, it was anticipated "that the owners would be more likely to be satisfied with the "sale to Mr. Bencard than with a sale to a competitor, and, "after careful consideration it was decided accordingly to accept "Mr. Bencard's offer." Of course, the custodian cannot have supposed that he was selling to the defendants as trustees, in any sense, for the plaintiffs—for that would have been contrary to law; but, in my judgment, the custodian was quite justified in paying regard to what he conjectured would have been the wishes of the plaintiffs, for the enemy status of the Danish people could not wholly destroy, or altogether conceal, their fundamental characteristic of being in truth our friends. The sale to the defendants was therefore, in my judgment, perfectly valid; the property in the insulin duly vested in the defendants; and the only question is whether the profit which ensued from the deal is one which they were entitled to make or, having made it, are entitled to keep.

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[9] [1920] 1 Ch. 268; 36 T.L.R. 173.

It is admitted that for several years before the outbreak of war and until the plaintiffs became "enemies," the defendants had acted as the plaintiffs' agents for a variety of purposes. They were also the sole concessionaires for the sale throughout the British Empire of a preparation of insulin in solution, known as Leo Insulin, manufactured by the plaintiffs. I need not describe in detail the association between the two companies, which was certainly both constant and close.

The agency necessarily came to an end when the plaintiffs became technical "enemies" and it was sought to be argued for the defendants that all the present and future consequences of the past agency were finally and irrevocably destroyed by that event. I cannot accept that. The equitable obligations which flow from the relationship of principal and agent cannot be so easily got rid of, nor does it seem to me to make any difference that the property in this stock of insulin was no longer, at the time when it was sold, the property of the plaintiffs. I cannot accept the view that the custodian either could or did deal with the insulin so as to destroy entirely the consequences of its previous history. Yet the defendants' view is that they were entitled to make this quick substantial profit exactly as if they had purchased this insulin from a vendor in the open market with no knowledge at all of any previous ownership. The fiduciary nature of an agency is, to my mind, far too deeply seated to be shaken and destroyed as easily as the defendants would seem to have supposed.

I was referred to a number of authorities, beginning with *Keech* v. *Sandford*,[10] where Lord King L.C. pointed out that a trustee should refuse to allow a lease to be renewed at all rather than accept it for himself. Then there is a salient passage in *Ex parte James*.[11] In *Regal (Hastings) Ld.* v. *Gulliver*[12] there is a relevant passage in the speech of Lord Wright,[13] where he poses the question "whether an agent, a director, a trustee or "other person in an analogous fiduciary position, when a demand "is made upon him by the person to whom he stands in the "fiduciary relationship to account for profits acquired by him "by reason of his fiduciary position, and by reason of the

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[10] Sel.Cas.Ch. 61 (2nd ed. 1850).

[11] 8 Ves. 337, 352.

[12] [1942] 1 All E.R. 378.

[13] Ibid. 392.

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"opportunity and the knowledge, or either, resulting from it, is "entitled to defeat the claim upon any ground save that he "made profits with the knowledge and assent of the other "person." Lord Wright then proceeds as follows: "The most "usual and typical case of this nature is that of principal and "agent. The rule in such cases is compendiously expressed to "be that an agent must account for net profits secretly (that "is, without the knowledge of his principal) acquired by him in "the course of his agency. The authorities show how manifold "and various are the applications of the rule. It does not depend "on fraud or corruption."

Another useful and relevant case is *Lamb* v. *Evans*,[14] in which it is pointed out among other things material to the present case that there is no distinction between law and equity as regards the law of principal and agent, and that any materials or information acquired by an agent in the course of his agency may not be used thereafter by the agent to secure an advantage to himself. There are many cases in the reports where disqualification arising from an agency continues after the agency has come to an end, notably *Carter* v. *Palmer*[15] and *Luddy's Trustee* v. *Peard*.[16] The latter is also relevant because there a solicitor was dealing with the trustee in bankruptcy of a person who had previously been the solicitor's client, the client having accordingly no longer any interest in the property in question. In that case also the solicitor gave the trustee to believe that the purchase was by and on behalf of the bankrupt's family, not on behalf of himself, which is analogous to the present in so far as the custodian here understood that the defendants were purchasing in some sense for the ultimate benefit of the plaintiffs. Reference may also be made to some relevant observations in the judgment of Parker J. in *Allison* v. *Clayhills*.[17]

I do not, as I have said, overlook the fact that the plaintiffs' interest in the insulin at the time of its sale to the defendants was somewhat shadowy, if indeed it existed at all: see *Hugh Stevenson & Sons Ld.* v. *A-G. für Carton-nagen-Industrie*.[18] There was here of course no actual vesting of the property in the custodian and, presumably, the proper view is that the ownership was in suspense. The differences between the form of the Trading with the Enemy Act, 1939, and the legislation of 1914 are in

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[14] [1893] 1 Ch. 218, 229.

[15] 8 Cl. & F. 657, 705, 706.

[16] 33 Ch.D. 500.

[17] 97 L.T. 709.

[18] [1918] A.C. 239, 249, 250.

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some respects considerable, but not material to the issues in the present case.

I think that the proper conclusion is either that the sum of £3,546 5s. 6d. was at the date of the issue of the writ on June 27, 1949, held by the defendants as trustees for the plaintiffs, or that the plaintiffs are entitled to that sum as damages either for breach of duty or for breach of trust. On any view of this matter, I hold that it would be unconscionable for the defendants to withhold this sum of money from the plaintiffs. It may well be that the object of the defendants in obtaining control of this valuable drug was in part philanthropic, that is to say, to secure a continuance of its supply to those who needed it. It is also, I think, right to say the defendants did nothing wrong in selling the property to Boots Pure Drug Company Ld., and the only question is, who should get the benefit of that very profitable deal? I hold as a fact that had it not been for the information acquired by the defendants, in the course of their agency, from the plaintiffs, they would probably never have heard of this stock of insulin; would never have had the chance of first buying it and then reselling it upon such advantageous terms. Had it not been for their uncandid and, indeed, untruthful letters, I should have been glad to acquit the defendants of any fraudulent intention. It perhaps suffices to say that they have, in my view, failed to understand their obligations in law. I give judgment for the plaintiffs for the sum of £3,546 5s. 6d. with simple interest at 4 per cent. per annum from the issue of the writ until payment and the costs of the action. I do not see my way to awarding interest from any date earlier than the one I have named.

I. G. R. M.

The defendants appealed.

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Feb. 17, 18, 19, 20: *Mar.* 31.

Evershed M.R., Jenkins L.J. and Roxburgh J.

J. G. Strangman Q.C. and *D. S. Chetwood* for the defendants.

F. W. Beney Q.C. and *M. R. Hoare* for the plaintiffs, Nordisk Insulinlaboratorium.

The arguments were concerned largely with the questions which only arose if there had been a subsisting fiduciary relationship between the plaintiffs and their ex-agent after they had become enemy aliens. On the decision of the court there was no such relationship and the arguments are, therefore, omitted.

Cur. adv. vult.

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March 31. The following judgments were read:—

EVERSHED M.R. The claim in this action was for a sum of £3,546 5s. 6d. profit made by the defendants upon the sale to them and resale by them in the autumn of 1940 of 57½ million international units of crystallized insulin. The defendants, formerly known and sued as C. L. Bencard (1934) Ld. (and I shall hereafter refer to them, as did counsel in the case, simply as Bencard, the name being also used with the prefix Mr. to indicate the managing director of the defendants) bought this parcel of insulin from the Custodian of Enemy Property, it having belonged to the plaintiffs (hereafter referred to as Nordisk) who had deposited the insulin not long before the outbreak of the second world war in certain branches of the National Provincial Bank Ld. in England.

[His Lordship referred to the facts and continued:] It is conceded on the part of Nordisk that the custodian on completion of the sale passed a good title in the insulin to Bencard or, rather, to Bencard's sub-purchasers; and from this it appears to follow that from the moment that the sale took effect Nordisk ceased to have, for all time, any proprietary interest at all in the insulin. No point has been made of the fact that the property in the insulin passed direct from the custodian to Bencard's sub-purchasers so that Bencard in fact paid away nothing and received from their sub-purchasers the amount of the profit made on the subsale.

The case is of an unusual character, and the basis of Nordisk's claim is a manifestation of an old and broad equitable principle to the effect that, notwithstanding the intervention of the Custodian of Enemy Property, it is unconscionable for Bencard to make the profit in question out of the former property of Nordisk; and that it is so unconscionable because, before the invasion of Denmark by the Germans, the relationship between Nordisk and Bencard was that of principal and agent. No case has been found in the books which can fairly be said to be comparable to the present.

The claim of Nordisk which I have thus indicated is pleaded in the statement of claim as follows: "Thereafter the defen-"dants, without the knowledge or consent of the plaintiffs, and "without disclosing to the custodian their knowledge of and "interest in the said stocks of insulin . . . or the true value "thereof . . . in breach of the duty which they owed to the "plaintiffs as a consequence of the agency aforesaid . . . pur-

"chased the whole of the said stocks of insulin from the "custodian at what they knew to be under value . . . and "resold the same to . . . Boots Pure Drug Co. Ld. . . . for ". . . its true value . . . and thereby in fraud of the plaintiffs "made a profit upon the said transaction for themselves of "£3,546 5s. 6d."

Notwithstanding the express reference to fraud in the paragraph I have read, Mr. Beney has made it clear in this court, as he made it clear in the court below, that he was not relying on any allegation of fraud or misrepresentation on the part of Bencard; in other words, the use of the word "fraud" in the paragraph must be taken to be the alleged effect in the eye of equity of the circumstances earlier pleaded—in other words, that the retention against Nordisk of the profit made by Bencard would be unconscionable conduct on the part of the latter.

I shall have to examine more closely hereafter the premises upon which this alleged equity is said to rest. But it is first convenient to refer to the conclusion of Vaisey J. upon the matter. He said: "The agency necessarily came to "an end when the plaintiffs became technical 'enemies,' and "it was sought to be argued for the defendants that all the "present and future consequences of the past agency were "finally and irrevocably destroyed by that event. I cannot "accept that. The equitable obligations which flow from the "relationship of principal and agent cannot be so easily got rid "of, nor does it seem to me to make any difference that the "property in this stock of insulin was no longer, at the time "when it was sold, the property of the plaintiffs. I cannot "accept the view that the custodian either could or did deal "with the insulin so as to destroy entirely the consequences of "its previous history. Yet the defendants' view is that they "were entitled to make this quick substantial profit exactly as "if they had purchased this insulin from a vendor in the open "market with no knowledge at all of any previous ownership. "The fiduciary nature of an agency is, to my mind, far too "deeply seated to be shaken and destroyed as easily as the "defendants would seem to have supposed."

It will be noticed from the passage which I have read that in the view of Vaisey J. the pre-existing relationship of principal and agent between Nordisk and Bencard gave rise, during the existence of the agency, to fiduciary relations so "deeply seated" that they survived the destruction of the agency as the result of the war, and so enabled Nordisk, as soon as the "enemy" sloth had been cast off, to treat Bencard as still affected, as regards former property of Nordisk or its proceeds, by the fiduciary relationship which (it is assumed) emerged from the agency itself.

There is no doubt whatever that Vaisey J. took a most unfavourable view of Mr. Bencard himself on the ground that in his dealings with the custodian, and particularly in certain of his letters to the custodian, he had been not only uncandid and tendentious in his statements, but had also deliberately misled the custodian. [His Lordship referred to certain passages in the judge's judgment, and continued:] Vaisey J.'s final conclusion on the facts was: "I hold as a fact that had it not been for the "information acquired by the defendants, in the course of their "agency, from the plaintiffs, they would probably never have "heard of this stock of insulin; would never have had the chance "of first buying it and then reselling it upon such advantageous "terms. Had it not been for their uncandid and, indeed, "untruthful letters, I should have been glad to aquit the "defendants of any fraudulent intention."

It is to be noted that in that passage there are, as I think, two separate findings of fact, namely, (1) that Bencard's chance (of which advantage was taken) of obtaining the insulin at all, that is, the opportunity to approach the custodian in regard to it, and thereby to set on foot the various steps which ended in the sale, was attributable to the fact that, as agent of Nordisk, Bencard had special knowledge of the existence, location, etc., of the insulin; and (2) that during his negotiations with the custodian and with a view of persuading the custodian (as he in fact did) to sell the insulin to his company, Mr. Bencard deliberately misled the custodian. For the purposes of the present proceedings these two separate findings seem to me to be of a wholly different character and importance, and the second is not, in my view, directly relevant to Nordisk's claim; nor was it, as I understood his argument, relied on as such by Mr. Beney. Mr. Strangman challenged all these findings of fact by Vaisey J., and I am bound to say that he did so with some force and not the less so because of Mr. Beney's plain disclaimer, already noticed, of any allegation of fraud or misrepresentation. I have not had the advantage which Vaisey J. had of seeing Mr. Bencard in the witness box and observing not only the answers that he gave but the way in which he gave them. Having regard, however, to Mr. Beney's disclaimer, it seems to me that Mr. Bencard is at least entitled to have it said that no charge of fraud or dishonesty has been made against him or his company, and there is, accordingly, no room for any finding to that effect.

As regards Mr. Bencard's negotiations with the custodian (so far as they are relevant, and I have already said that I do not think that they are relevant) Mr. Beney was content to proceed on the basis that Mr. Bencard thought—with some justice—that in all the circumstances his company had a far better moral claim to become the purchaser of the insulin than Boots Pure Drug Co. Ld. and their English associates, and that this claim was of so strong a character that there should be no question of exacting from Bencard the best price, but that in pressing this view upon the custodian he did appreciably overstate in fact the grounds for its validity. Though it is fair to say that these matters may not have been investigated as fully as might have been the case apart from Mr. Beney's disclaimer in the court below, there seems no doubt to me that at least in some of the letters Mr. Bencard did in certain respects appreciably overstate his case; though this is not of course to say that he did not honestly believe or persuade himself of the truth of what he said and the justice of his claim. Perhaps Mr. Bencard provides the best commentary on his own conduct.

[His Lordship referred to the answer given by Mr. Bencard in reply to a question by Vaisey J. that, having regard to the fact that the insulin was passed direct to Boots and was not in his possession at all, he was not surprised that the plaintiffs were annoyed that out of a total of £13,169 8s. 6d. only about £9,000 should go to them and the rest went to the defendants. His Lordship continued:] Having said so much, in part out of respect for Mr. Strangman's argument for his client, I leave these matters, having already indicated more than once that I do not think that they are relevant to the claim in the action.

It is now convenient that I should state as briefly as I can the essential matters of fact on which there seems no doubt or dispute. [His Lordship stated the further facts and continued:] If the custodian had been misled as regards Bencard's intentions or in any other relevant respect, the resulting cause of action would have been the custodian's; but the custodian, with full knowledge of all the facts, affirmed the sale. Mr. Beney does not, then, rest his case on any undue persuasion of, or representations made to, the custodian. He bases it on the initial advantage that Bencard had towards acquiring the insulin from their knowledge of its existence, location, and so forth. They had this knowledge because they had been the agents of

Nordisk; and (says Mr. Beney) the knowledge was accordingly of a fiduciary character so that the obligations which, as he claims, flow therefrom, persist to this day and, however much they may have been suspended while Nordisk bore an enemy character, they are now available to Nordisk.

The question was raised during argument, and in other cases might call for determination, whether, if such fiduciary relationship and duties existed, they were in origin and essence contractual; and if so, whether they would necessarily come to an end when one party to the contract became an enemy. Roxburgh J., during the course of the argument, sought to test the matter by supposing that the obligations which, as Nordisk now say, rest upon Bencard had been expressly set out in appropriate terms as part of the original contract of agency between them. In such case it would at least appear from authorities like *Zinc Corporation Ld.* v. *Hirsch*[1] that as soon as one party to the contract acquired enemy status, all the contractual terms would come entirely to an end. If so, then can some residuary obligation in equity, notwithstanding the final abrogation of the contract, be asserted by one party to the former contract against the other? And can Nordisk be in any stronger position if the obligations never formed part of the express terms of the contract? It is unnecessary for me to answer these questions.

Nor do I have to suggest what the answer would be to a case like *Carter* v. *Palmer*,[2] supposing that the principal or client, Palmer, had become an enemy and that, during the period of his enemy character, his counsel, Carter, had acquired from the custodian, by making use of information which he had acquired as Palmer's counsel, some of Palmer's property. Another case was also suggested in argument, that is, where the property formerly belonging to the "enemy" and sold by the custodian contained some hidden value or secret additional material, knowledge of which had been acquired confidentially by the buyer before the war. It is unnecessary for me to express conclusions on any of these matters because, in my judgment, the major premise upon which Mr. Beney's argument rests is not well founded. In my opinion such knowledge as Bencard had as regards the existence, location, quantities or value of the insulin bought was not "confidential" in any relevant sense, that is, such as to impose any special duty or restraint upon Bencard in the events which happened. It does not, for one thing, appear to have been secret—the existence of the insulin had been disclosed to several persons (hospitals, doctors, and the like) by Bencard with the approval of Nordisk, and I cannot find any basis for the view that Bencard was under some strict duty not to disclose to anyone that the stocks of insulin were here. Certainly, anything that Bencard knew was also known to Nordisk—there is no question at all of Bencard having, while acting as agent, acquired some knowledge which he could have used against his principal because his principal did not himself have that knowledge. Once the insulin had been deposited Bencard had towards Nordisk no duties whatever to perform in regard to it.

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[1] [1916] 1 K.B. 541.

[2] (1842) 8 Cl. & F. 657.

It is conceded that Bencard cannot be treated as having at any time been under an absolute bar, like that which attaches to a trustee towards his beneficiary against purchasing, for Bencard was not in any sense a trustee of the insulin. Bencard had in fact no right or interest in it. It also seems to me that Bencard was not in a position vis-à-vis Nordisk comparable to the position of directors of a company vis-à-vis their own company, as in *Regal (Hastings) Ld.* v. *Gulliver*,[3] which was much relied on by the plaintiffs; for in the latter case the directors were essentially acting in regard to the affairs of the company of which they were the directors. In my judgment, Bencard cannot in the circumstances of this case be regarded as agents dealing with the property of their principal, or as acting in relation to the affairs of their principal. As I have already said, Bencard had no duties whatever to perform in regard to it; and assuming that the part (such as it was) played by Bencard in assisting Nordisk to make the deposits was attributable to the fact that Bencard were Nordisk's selling agents for "Leo" insulin, Bencard's agency as a matter of contract had later altogether gone, and the property, when it was sold, admittedly became absolutely the property of the purchasers.

It is to be observed that if I am wrong in this view, the consequence would appear to be that even if the insulin had been bought by Bencard at the best possible price, and had then been used by Bencard for conversion into "Leo" insulin and thereafter distributed in the ordinary course of business to hospitals and doctors, Bencard would be accountable to Nordisk for any profit made out of this part of their business. It would also seem to follow (as Mr. Strangman observed in the course of his reply) that in the case of a partnership subsisting before the impact of war, an English partner would be disabled from acquiring from the custodian the share in the business of another, who became an enemy, without liability to account to that other when his enemy status ceased for any profits attributable to that other's share; a conclusion which appears to be in conflict with the language of Lord Dunedin in *Hugh Stevenson & Sons Ld.* v. *A-G. für Carton-nagen-Industrie.*[4]

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[3] [1942] 1 All E.R. 378.

The matter can, in my judgment, be properly put thus: Nordisk claim in the action on the basis that Bencard, being former agents, have made a profit out of a dealing with the property of Nordisk. To such a claim Bencard have prima facie this answer: "The agency had wholly ceased and the property "in question was not at the material date your property, for an "absolute title to it was acquired from the custodian." Whatever might be said in other circumstances and in other cases, Bencard cannot, in my judgment, on the facts of this case be disentitled to plead this answer to Nordisk's claim, either on the ground that they would thereby be relying on or pleading their own wrongful conduct or otherwise. Although, therefore, I think that a man of finer sensibilities than Mr. Bencard might not have wished his company to retain the quick profit that they made against their own former principals and business associates who were rendered powerless and mute by the irruption of a common enemy, that is not a matter with which we are concerned. Nor are we concerned with any complaint that the custodian might have had of the arguments used by Mr. Bencard to persuade him (the custodian) to sell to Bencard this insulin: for, beyond a peradventure, the custodian affirmed the sale and Nordisk have not become entitled by assignment or otherwise to any cause of action (if such there could have been) in the custodian. The question for our determination is whether we can discern any recognizable equity which enables Nordisk to attach, so to speak, in Bencard's hands the profit made by them to the custodian's knowledge on the sale and resale of the insulin, or otherwise to make Bencard accountable therefor to Nordisk. In my judgment there is no such equity, and I think, therefore, that the appeal must be allowed.

JENKINS L.J. I agree. In order to hold the judgment given in their favour by Vaisey J. the plaintiffs must show: (a) that the defendants owed the plaintiffs some fiduciary duty with respect to the plaintiffs' deposits of insulin crystals in this country; (b) that unless destroyed by the relegation of the plaintiffs to enemy status occasioned by the German occupation of Denmark in April, 1940, this fiduciary duty had the effect of making the defendants accountable to the plaintiffs for the profit arising from the defendants' purchase from the Custodian of Enemy Property, and resale to Boots, of the plaintiffs' deposits of insulin crystals, having regard to the way in which these transactions were in fact carried out; and (c) that this fiduciary duty was not destroyed by such relegation, or (I should add) by the effect of the Trading with the Enemy legislation.

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[4] [1918] A.C. 239.

I have found myself unable to reach a conclusion favourable to the plaintiffs on the first two of these three essential elements of their case; and it is therefore unnecessary, in the view I take, to determine whether, given success on the first two points, they would have been able to surmount the difficulties involved in the third.

The alleged fiduciary duty, if it existed at all, could only have existed by virtue of the agency agreement. But the agency agreement was concerned only with the sale of "Leo" insulin in solution. It had nothing to do with crystal insulin or with dry insulin in any form. Its connexion with the plaintiffs' deposits of crystal insulin was tenuous in the extreme, and consisted merely in the fact that the defendants, being the plaintiffs' agents for "Leo" insulin in solution and consequently known to the plaintiffs, and being licensed importers of insulin, as they had to be for the purposes of the agency, were asked by the plaintiffs to assist, and did in fact assist, in the importing and depositing of the crystal insulin at the three agreed bank branches. The crystal insulin, once deposited, was held by the branch banks to the order of the plaintiffs as the plaintiffs' property, and the defendants thenceforth had no more to do with it, and no further responsibility for it or functions to perform in regard to it. Mr. Bencard did no doubt regard these deposits as, so to speak, earmarked for the purpose of maintaining his stocks in this country of "Leo" insulin in the event of supplies from Denmark being cut off. But this represented no more than his own wish in the matter. The plaintiffs had exclusive ownership and control of the deposits, and it was for them to decide whether the deposits should, if occasion arose, be used in the way contemplated by Mr. Bencard or returned to Denmark, or removed to some other country, or otherwise disposed of. The defendants were not put in charge of the deposits on the plaintiffs' behalf, or engaged to sell them for the plaintiffs, or to advise the plaintiffs as to their disposal. The most that can be said is that the defendants knew of the existence or location of the deposits, of their approximate amount, and of their insured value, that they possessed this knowledge because they had assisted in making the deposits, that they would not have been selected to assist in making the deposits if they had not been the plaintiffs' agents for "Leo" insulin, and consequently that this knowledge was acquired by the defendants by reason of such agency.

In these circumstances it would to my mind be obviously impossible to hold that the defendants were trustees for the plaintiffs of the deposits of crystal insulin so as to bring them within the strict rule established by the line of cases beginning with *Keech* v. *Sandford* [5] that a trustee must not profit from his trust, and thus make them accountable to the plaintiffs for the profit here in question.

But it is said that the knowledge which I have mentioned having been acquired by the defendants by reason of the agency (albeit only by reason of it in the indirect and collateral sense I have indicated) the defendants on the principle illustrated by *Carter* v. *Palmer* [6] were under an obligation to the plaintiffs not to make use of it to the detriment of the plaintiffs or for their own profit. To assess the merits of this argument a distinction must be drawn between knowledge possessed by the agent but not by the principal, and knowledge common to principal and agent; and also between dealings by the agent with the principal and dealings by the agent with third parties. The knowledge here imputed to the defendants was knowledge common to themselves and the plaintiffs. Indeed, the plaintiffs as the actual manufacturers must be taken to have had fuller and more accurate knowledge than the defendants of the quantity, quality and value of the deposits. It surely follows that the mere fact that the defendants possessed this knowledge, fully shared as it was by the plaintiffs, could not place the defendants under any fiduciary duty to the plaintiffs for the purposes of a purchase of the deposits by the defendants from the plaintiffs. Suppose the agency had been terminated for some reason other than the relegation of the plaintiffs to enemy status, and suppose the defendants had offered to purchase the deposits for themselves from the plaintiffs at the price of 4d. per 100 units, and suppose further that the plaintiffs had accepted such offer, I fail to see on what principle the plaintiffs could have held the defendants accountable for any profit they might make on a resale at (for example) 5½d. per 100 units.

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[5] (1726) Sel.Cas.Ch. 61.

[6] 8 Cl. & F. 657.

If I am right in thinking that in these hypothetical circumstances the defendants would have been under no liability to account to the plaintiffs, there, as it seems to me, is an end of the case; for if a sale by the plaintiffs themselves to the defendants at 4d. per 100 units, followed by a resale by the defendants at 5½d. per 100 units would not have placed the defendants under any liability to account to the plaintiffs for the profit, I fail to see how the plaintiffs could hold the defendants accountable for the profit derived from a sale by the custodian to the defendants at 4d. per 100 units followed by a resale by the defendants at 5½d. per 100 units. In other words, I fail to see how the defendants, in purchasing from the custodian at 4d. per 100 units and reselling to Boots at 5½d. per 100 units, could have placed themselves under a liability to account to the plaintiffs which they would not have been under if the plaintiffs had not been enemies, and the defendants had bought from the plaintiffs and resold to Boots at those same prices.

There was one other argument to the effect that the defendants in bringing to the notice of the Board of Trade and the custodian the existence and location of the deposits were divulging to third parties confidential information acquired by reason of their agency; that it was this disclosure which enabled the defendants to buy the deposits from the custodian and resell them at a profit; and that the defendants consequently became accountable to the plaintiffs for such profit on the principle to which I have already referred. I cannot accept this argument. The defendants wanted to acquire the deposits. They were perfectly entitled to do that if they could come to terms with a person entitled to sell. They could not lawfully make an offer for the deposits to the plaintiffs, who were enemies. The only person with whom they could treat was the custodian, in the event of an order authorizing him to sell being made. In these circumstances I cannot see that by causing the existence of the deposits to be brought to the notice of the Board of Trade and the custodian, with a view to making an offer for them in the event of an order for sale, the defendants were divulging confidential information to third parties within the meaning of the principle referred to above. To hold otherwise, and make the defendants consequently accountable for their profit, would I think be contrary to public policy, for that would tend to the suppression of information required by law to be communicated

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Jenkins L.J.

to the proper authorities. The bank was in any case under a legal obligation to report the existence and particulars of the deposits, and would doubtless have done so without the defendants' intervention.

For these reasons I am of opinion that the plaintiffs' claim fails, and, as I have already indicated, I find it unnecessary to consider what the effect of the relegation of the plaintiffs to enemy status, and the Trading with the Enemy legislation, might have been upon the existence or operation of any relevant fiduciary duty which would otherwise have been owed by the defendants to the plaintiffs, because my consideration of the case without regard to these factors has led me to conclude that no such fiduciary duty would have been so owed.

Mr. Beney, for the plaintiffs, disclaimed any charge of fraud or misrepresentation on the part of the defendants in their dealings with the custodian, and it is, therefore, unnecessary for me to deal with that aspect of the case.

Accordingly, I would allow the appeal.

ROXBURGH J. [read by the Master of the Rolls]. I agree. Although Vaisey J. expressed an unfavourable view of Mr. Bencard, he did not, I think, decide against the defendants on the ground of fraud (a charge which Mr. Beney had not made and of which, therefore, they could not have been found guilty) but upon the ground that they had acquired confidential information in the course of their agency for sale of "Leo" insulin in solution which precluded them from disclosing the existence and whereabouts of the deposits of crystals to the custodian without at the same time more fully and frankly disclosing other matters; and that this breach of duty procured them the profit. I find no analogy between the custodian and any other third party, for instance a trade competitor, and there is no reported case in which any such duty has been cast upon an agent who has dealings with the custodian after his principal has become an "enemy." In my view, no such duty exists, or could exist consistently with the requirements of public policy.

Appeal allowed.
Leave to appeal to House of Lords granted.

Solicitors: *W. Wallace Harden; Roche, Son & Neale.*

E. D.

GODFREY PHILLIPS LD. *v.* THE INVESTMENT TRUST CORPORATION LD.

1952
Nov. 11;
Dec. 10.

Wynn-Parry J.

[1951 G. 2978.]

Company — Dividends — Underpayment to cumulative preference shareholders due to erroneous method of computation—Aggregate sum representing deficiency of dividends—How distributable.

Between the years 1939 and 1951, the holders of "B" cumulative preference shares in a company, whose dividends ranked in priority to those of the holders of junior issues of shares and stock, received dividends on a certain basis. In 1948 the correctness of the method of computation was challenged and it was held, in legal proceedings, that such method was erroneous, and that the holders of "B" shares had been underpaid since 1939. An action was begun by the company to determine (1) from what date the dividend must be regarded as being deficient (1939 or 1948); (2) to whom the balance of the dividend ought to be distributed; and (3) the rate of income tax which the company was entitled to deduct when making the distribution:—

Held, (1) that, before any further distribution of profits was made, the amount by which the payment of the dividend in respect of the "B" shares over the period from 1939 fell short of the sum which ought to have been paid should first be distributed; (2) that the aggregate sum was divisible exclusively among the holders of "B" shares appearing as such on the register of members at the time of the declaration of the dividend, by which the aggregate sum would thus be distributed; (3) that the rate of income tax which the company was entitled to deduct, when distributing the aggregate sum by way of dividend, was the standard rate in force when the dividend was declared.

Matthews v. *Great Northern Railway Co.* (1859) 28 L.J.Ch. 375 distinguished.

Friends Provident and Century Life Office v. *Investment Trust Corporation Ld.* [1951] W.N. 476; [1951] 2 All E.R. 632 referred to.

SPECIAL CASE.

The plaintiff company, Godfrey Phillips Ld., sought the opinion of the court on certain questions of law arising out of the decision of the House of Lords in *Friends Provident & Century Life Office* v. *Investment Trust Corporation Ld.*,[1] in an appeal in which the second and third defendants were appellants and the first defendant and the company were respondents. That decision

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[1] [1951] W.N. 476; [1951] 2 All E.R. 632.

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determined the correct mode of computing the cumulative dividend payable on the "B" cumulative preference shares of the company. The effect of that decision was that the dividend must be regarded as having been underpaid for several years past and the questions on which the company now desired to obtain the opinion of the court were (a) from what date the dividend must be regarded as being deficient; (b) whether the balance of the dividend should be distributed among the holders of the said shares registered at the respective times when the deficient dividends were paid or paid wholly to those registered at the time when the said balance was hereafter paid; and (c) a question relating to the rate of income tax to be deducted when the distribution was made.

The present issued share capital of the company is £2,365,990 divided into 250,000 cumulative preference shares of £1 each, 300,000 "B" cumulative preference shares of £1 each, 300,000 "C" cumulative preference shares of £1 each, £1,431,827 ordinary stock and 841,630 ordinary shares of 2s. each. All the said shares are fully paid up. The ordinary shares and ordinary stock rank pari passu in all respects.

The rights conferred on the holders of the respective classes of shares are set out in article 5 of the present articles. The rights conferred on the holders of the "B" cumulative preference shares have been in the same form ever since they were created and issued in 1919.

By article 5 (A) (ii), it was provided: "The 'B' cumulative "preference shares confer the right to a fixed cumulative prefer-"ential dividend at such rate that after deduction of income tax "thereon at the current rate for the time being (irrespective of "any allowance or rebate in the case of a particular shareholder) "the amount remaining shall be the clear sum of 6 per cent. "per annum on the capital paid up thereon less the amount "of any income tax for the time being payable in excess of "6s. in the £ computed on the gross sum of 6 per cent. per "annum on such capital, such dividend to rank next after the "dividend payable in respect of the said 250,000 cumulative "preference shares and in priority to the dividend on the said "300,000 'C' cumulative preference shares and also on the "ordinary shares for the time being of the company, but to no "further right to participate in the profits of the company."

The standard rate of income tax first rose above 6s. in the £ for the fiscal year 1939/40 and has remained above that rate ever

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since. From 1939 until April 30, 1951, the company calculated the dividend on the " B " shares in accordance with the following example for a holding of 100 shares, a dividend for a full year and a standard rate of tax of 9s. in the £.

	£	s.	d.
6 per cent. on 100 shares of £1 each	6	0	0
Equivalent to gross (at 6s. in the £)	8	11	5
Less income tax at 6s. in the £	2	11	5
	6	0	0
Less income tax at 3s. in the £ calculated on gross sum of £8 11s. 5d.	1	5	8
Net dividend to shareholder	4	14	4

In 1948 a holder of " B " cumulative preference shares challenged this method of computation, and, as a result of proceedings instituted in the Chancery Division for a declaration as to the true construction of article 5 (A) (ii), the effect of the abovementioned decision of the House of Lords was that the dividend on the " B " cumulative preference shares ought to be computed in the following manner:—

	£	s.	d.
6 per cent. on 100 shares of £1 each	6	0	0
Less income tax at 3s. in the £ to be borne by the shareholders and being the excess of the standard rate of tax over a rate of 6s. in the £ calculated on £6		18	0
Net dividend to shareholder	5	2	0

For every year in which the dividends on the " B " cumulative preference shares were underpaid, the dividend on the " C " cumulative preference shares (which rank subsequently to the " B " shares) was paid in full, and interim and final dividends were paid on the ordinary stock and shares.

Notices of annual general meetings of the company held before the year 1951 were not sent to holders of the " B " cumulative preference shares, and the holders thereof did not, during the period between 1939 and 1950 inclusive, vote as such on any resolutions of the company in general meeting, except the special resolution adopting the present articles.

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The plaintiff company claimed by their writ:—

(1) A declaration that, in calculating the aggregate sum which ought to be paid to the holders of the "B" cumulative preference shares in the capital of the company, as representing the amount by which the sums already paid by the company on account of the cumulative preferential dividend on such shares fell short of the sums which ought to have been paid on account thereof, the earliest half-yearly payment on account of such dividend, which was to be regarded as having been deficient (such payment being hereinafter referred to as "the relevant payment") was made on October 31, 1948:

(2) Alternatively, a declaration that the relevant payment was that made on October 31, 1939 . . . [the date of the half-yearly payment made next after the standard rate of income tax first rose above 6s. in the £.]

(3) A declaration that the said aggregate sum was divisible exclusively amongst the holders of the said "B" cumulative preference shares appearing as such on the register of members of the plaintiff company at the time of payment of the said aggregate sum.

(4) Alternatively, a declaration that so much of the said aggregate sum as represents the deficiency of a particular half-yearly payment of the said dividend was divisible amongst the persons who appeared as holders of the said "B" cumulative preference shares on the said register at the time when that half-yearly payment was paid, whether or not such persons should appear as such at the time of payment of the said aggregate sum.

(5) A declaration that the rate of income tax which the plaintiff company was entitled to deduct from the said aggregate sum was the standard rate in force at the date of payment thereof.

(6) Alternatively, a declaration that the rate of income tax which the plaintiff company was entitled to deduct from so much of the said aggregate sum as represented the deficiency of a particular half-yearly payment of the said dividend was the standard rate in force at the date when that half-yearly payment was paid.

R. J. T. Gibson for the plaintiff company.

Ralph Instone for the Investment Trust Corporation Ld., a holder of "B" cumulative preference shares. The cumulative preference shareholders are entitled to the maximum amount of arrears. October 31, 1939, is the relevant date for computing the arrears. That is the date on which the first yearly payment was made after the standard rate of income tax rose above 6s. in the £. The " B " preference shareholders can only be deprived of what, on the face of it, is the arrears to which they would be entitled if there is something in the nature of estoppel or waiver. They have the right to have future dividends adjusted in the ordinary way. [He referred to *Lagunas Nitrate Co. Ld.* v. *Schroeder & Co. and Schmidt.*[2]]

As against the company, all that has happened is that certain dividends have been paid on these shares of a smaller amount than that which ought to have been paid, and an additional distribution has been made to persons who ought not to have received it. There is no question of laches or acquiescence against the company: see *Evling* v. *Israel & Oppenheimer Ld.*[3] The " B " shareholders can say that before any further dividend is made on the " C " preference shares the deficiency on the " B " shares must be made up. They may say " out of subsequent " distributions we must not only receive our distributions, but " also the arrears due to us. Our right against the company is " to have our arrears cleared off."

Victor Coen for the executors of a former holder of " B " cumulative preference shares, who had sold the shares between 1939 and 1951. There was an estoppel in favour of the " B " shareholders who were on the register at the date of the declaration of each dividend. By words or conduct the company made a representation to the preference shareholders, a representation of fact and not of law. The company did in fact declare a dividend on the full amount of the " B " shares on each occasion. This class of " B " shareholders is therefore entitled to participate in the adjustment which is now sought. The company suffered no detriment. The representation made was that the dividend had been properly paid in full.

R. W. Goff for holders of " C " cumulative preference shares and ordinary shares. The " B " preference shareholders, during the period of underpayment of preference dividends, raised no objection. If the company continues to make that payment and pays dividends to inferior shareholders, the " B " shareholders cannot have the accounts adjusted in respect of any period before the time of the challenge being made on their behalf. All that can now be hoped for by them is for an apportionment of the next dividend correctly. There has been acquiescence by the " B " shareholders, because they knew the articles of the company. [He referred to *Matthews* v. *Great Northern Railway Co.*[4] and *Ashbury* v. *Watson.*[5]]

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[2] (1901) 85 L.T. 22; 17 T.L.R. 625.

[3] [1918] 1 Ch. 101, 111; 34 T.L.R. 109.

Gibson in reply. The question of acquiescence rests on many cases. The matter should be submitted to the court on estoppel rather than acquiescence.

Cur. adv. vult.

December 10. WYNN-PARRY J. read the following judgment:—I propose to deal first with paragraphs 1 and 2 of the writ, which ask for alternative declarations.

[After summarizing paragraphs 1 and 2 of the writ and referring to *Friends Provident and Century Life Office* v. *Investment Trust Corporation Ld.*[6] his Lordship continued:] It is well established that, in respect of a right to dividend on a share, no debt is created until a dividend is declared. Over the maximum period involved, which goes back to October 31, 1939, too small a dividend was declared on each occasion. In respect of each dividend actually declared a debt was created in favour of each holder of "B" preference shares; but in respect of what I may call "the shortfall," on no such occasion was any debt created. Full effect was not given to the rights of the holders of the "B" preference shares, but the continued existence of those rights was not affected by reason of such failure.

It follows that, apart from any question of waiver or estoppel, which I will consider later, the holders of the "B" preference shares could insist as against the company and the holders of the shares and stock of the inferior classes that, before any further distribution of profits should be made, the amount by which the payment of dividend in respect of the "B" preference shares over the period from October 31, 1939, was short should first be distributed in respect of those shares.

It is argued, however, that having regard to the facts set out in the special case, outside which, of course, I cannot go, the holders of the "B" preference shares cannot so insist, because they have barred themselves by acquiescence or laches or waiver or are estopped from asserting their right so as to insist in respect of any earlier period than that beginning on October 31, 1948. In his argument, Mr. Goff, who appeared for the holders of the "C" preference shares and of ordinary shares and stock, sought to rely on *Matthews* v. *Great Northern Railway Co.*,[7] the headnote of which reads as follows: "By an Act of Parliament it "was enacted, that it should be lawful for any shareholder who "should have paid up one half the amount of any share or "shares of the G. N. R. Co., to require each share to be con- "verted into two half-shares, whereof the one half which should "be so fully paid up should be denominated deferred half- "share, and the other half of such share should be denominated "guaranteed half-share; and thenceforth in respect of each "whole share so divided, the whole of the interest and dividends "which would in each year have accrued should be applied in or "towards payment, in the first place, of interest or dividend "after the rate of £6 per cent. per annum on the amount paid "upon the half-share so denominated 'guaranteed,' and the "remainder, if any, should alone be payable to the half-share "so denominated 'deferred,' provided that the company should "not pay any other or greater amount of interest or dividend "upon the two half-shares than was for the time being paid on "each undivided share:—*Held*, upon the construction of this "section, that the holders of guaranteed half-shares were "entitled to be paid their £6 per cent. in each year not only "out of the dividends accruing in that year, but out of all "subsequent dividends; and, therefore, if in any year the divi- "dends were more than sufficient to pay £6 per cent. on the "guaranteed half-shares, the surplus must be applied in pay- "ment, in the first place of all arrears due on those half-shares "in respect of past deficiencies before any dividend could be "declared on the deferred half-shares.

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[4] (1859) 28 L.J.Ch. 375.

[5] (1884) 28 Ch.D. 56, 63.

[6] [1951] W.N. 476; [1951] 2 All E.R. 632.

"The holders of the guaranteed half-shares having in a "former year acquiesced in the declaration of a dividend on the "deferred half-shares, whilst there was an arrear of dividend due "on the guaranteed half-shares,—*Held*, that although they had "precluded themselves from making any claim in respect of "those particular arrears, they had not thereby renounced their "rights in respect of subsequent arrears."

The argument for the defendants is reported as follows: "Mr. Rolt, Mr. Denison and Mr. T. Stevens, for the defendants, "contended that, according to the true construction of the Act "of Parliament of 1848, the guaranteed dividends for each year "were to be made good only out of the dividends declared for "that year, and if in any year there was not sufficient to pay

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[7] 28 L.J.Ch. 375.

"£6 per cent. the holders of B stock were not entitled to have "the arrears paid up out of dividends declared in subsequent "years. This construction was acquiesced in in 1854, and could "not now be dissented from."

Most of the judgment of Wood V.-C. was devoted to a consideration of the scope of the rights of the holders of the guaranteed half-shares and the deferred half-shares. Towards the end of his judgment, however, he says this: "Then comes "the question of laches. It does not appear that I can hold "parties to be precluded, because they stand by acquiescing in "a certain sense, that is to say, not asserting their rights upon "a construction adverse to their view taken by the directors as "it was taken in the report of 1854. When I say adverse, I do "not quite coincide with what Mr. Denison urged, that it does "not appear that there was any assertion of right. The directors "announced their view, and nobody said anything. They were "content to take their dividend. Upon that I hold that they "cannot call back the dividends which have been paid down to "that time, but I do not think that that precludes them for all "time from saying that they have not renounced their rights, or "that the persons who may have bought A shares with the "notion that their rights were different from what the court has "now held them to be, can say to the B shareholders, You "who, rather than go into litigation, acquiesced in having the "money, which might have been paid in a particular way, "appropriated in a different way during a certain period of time, "are therefore bound in all time to give up that right. There is "nothing in the shape of misrepresentation or fraudulent holding "out to make me say, there is an equity to be fastened on all the "B shareholders for all time by reason of their acquiescing in "the view which might have been then taken."

It is to be observed that in the argument it was urged that there had been acquiescence in the past, but that this was put forward with a view to sustaining the point that such acquiescence operated to alter the rights of the holders of the guaranteed stock for the future. The Vice-Chancellor's judgment proceeds on the basis that there had been acquiescence as regards the prior period, for which conclusion he gives no express reason, but that such acquiescence could not affect the future. He treats it as a case in which a plea of laches could have been advanced against any attempt to "call back" the dividend, to use his own phrase.

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I have felt it necessary to refer to that case, because, as I have said, it was relied on in argument, and because the doctrine of acquiescence appears to have been relied on by the Vice-Chancellor. It is not, however, necessary for me, I think, to say more about that case than this; that in my view it does not touch the present case, in which neither acquiescence nor laches can, to my mind, play any part. The matter may be tested in this way. So long as no dividend or an insufficient dividend is declared, a " B " preference shareholder has no right to sue for the recovery of any money. His only right would be to sue for a declaration that the company is not entitled to pay any dividend on any inferior class of shares without first satisfying in full the rights of the holders of " B " preference shares, and for an injunction on the footing of such a declaration. Such an action would be for the enforcement of a legal right, and the injunction would be sought merely in aid of that legal right. Now where an injunction is sought merely in aid of a legal right, then lapse of time, unaccompanied by anything else, does not bar the right to the injunction, at any rate at the trial of the action, unless it would have barred the corresponding action at law. (See *Birmingham Canal Co.* v. *Lloyd*,[8] *Great Western Railway Co.* v. *Oxford, Worcester and Wolverhampton Railway Co.*,[9] and *Fullwood* v. *Fullwood*.[10])

In such a claim as I am considering, no statutory period of limitation would be applicable, and, therefore, prima facie, the holders of " B " preference shares would be entitled to maintain their claim in respect of the amount by which they have been underpaid.

It was argued that either they must be taken to have waived their rights as regards past years, or else as regards those years they would be estopped from asserting their rights. As regards waiver, I can find nothing in the special case to indicate that there has been anything in the nature of waiver. As regards estoppel, it is clear that the holders of " B " preference shares could not be precluded from asserting the true construction of the articles of association, because that construction has been pronounced on by the House of Lords and must apply for the future. Even if an estoppel could be pleaded in respect of the past years, I am unable to see how it could be established on the evidence in the special case and the accompanying documents. I cannot find any such representation of fact as would be necessary to found an estoppel, nor, assuming that difficulty to be overcome, is there any sufficient evidence that the company altered its position to its detriment.

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[8] (1812) 18 Ves. 515.

[9] (1853) 3 De G.M. & G. 341.

[10] (1878) 9 Ch.D. 176.

An argument was advanced on behalf of the holders of "B" preference shares, who have parted with their shares, which I had great difficulty in following. It involved the assertion, no doubt in a writ, by such a holder that the company owed him the amount by which he had been underpaid in the past as a debt presently payable. This assertion the argument admitted was completely false; but it was contended that the company could not, itself, assert the falsity. Apparently, the action would have progressed by the company putting in a defence pleading that no dividend had been declared; whereupon the ex-"B" preference shareholder would have put in a reply pleading that the company was estopped from setting up the plea of no declaration of dividend. This analysis must demonstrate the hopelessness of such an argument, because it involves completely forgetting that estoppel can only be a matter of defence and cannot be used, even in a reply, to found a cause of action.

I therefore conclude that the relevant payment was that made on October 31, 1939, and I shall therefore make a declaration in the sense of paragraph 2 of the writ.

I now proceed to deal with paragraphs 3 and 4 of the writ, which raise the question whether the aggregate sum to which I have referred is divisible exclusively among the holders of the "B" preference shares appearing as such on the register of members of the company at the time of payment of the aggregate sum, or whether, in fact, persons who were holders of "B" preference shares during the material period, but who have sold them, are entitled to share in such distribution in the manner specified in paragraph 4 of the indorsement on the writ.

Subject as below mentioned, in my view, this question must be answered in the former sense, for the simple reason that when the aggregate sum is distributed, the distribution will—as, indeed, it must—take the form of a dividend, and although that dividend will be calculated by reference to a period extending back to October, 1939, it will be a dividend solely in respect of the year in which profits are declared for division, the amount being by virtue of article 5, as construed by the House of Lords, determined by the whole amount of the aggregate sum: see *In re*

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Wakley.[11] Such a dividend could only be paid to those persons who are registered as the holders of "B" shares at the time of the declaration of the dividend. I shall, therefore, make a declaration in the sense of paragraph 3 of the indorsement on the writ, but the declaration will refer to the time of the declaration of the dividend by which the aggregate sum is distributed instead of to the time of payment of the aggregate sum.

As regards paragraphs 5 and 6 of the indorsement on the writ, it follows from what I have said in dealing with paragraphs 3 and 4 that the rate of income tax which the company is entitled to deduct when distributing the aggregate sum by way of dividend is the standard rate in force when the dividend is declared.

Declaration accordingly.

Solicitors: *Gouldens.*

J. L. D.

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[11] [1920] 2 Ch. 205; 36 T.L.R. 325.

In re ROBB, DECD.
MARSHALL *v.* MARSHALL AND OTHERS.

[1952 R. No. 1972.]

1953
March 19.

Danckwerts J.

Will—Accumulation—Annuity—Power to accumulate surplus income—Validity—Implied trust to accumulate—Annuity payable "out of "annual income"—Destination of surplus income after end of accumulation period—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 164.

A testator, who died on November 25, 1916, by his will devised and bequeathed his residuary real and personal estate to trustees upon trust for sale to pay his debts, funeral and testamentary expenses, and to invest the residue in authorized investments, and out of the annual income thereof he directed his trustees to pay annuities to his wife and daughter; and after the deaths of his wife and daughter he directed his trustees to stand possessed of his residuary estate and the investments representing the same in trust for all his grandchildren who should be living at his death or any of them born at any time afterwards and who being male attained the age of 25 years before the expiration of 21 years from the death of the survivor of his wife and daughter or being female attained that age or married before the expiration of such 21 years if more than one in equal shares.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

The testator empowered his trustees to accumulate the surplus income (if any) of his residuary estate at compound interest by investing it and the resulting income in authorized investments.

The testator's widow died on December 9, 1921. The annuity given by the will to her was duly paid during her life, and the annuity given by the will to the testator's daughter had been duly paid.

The surplus income of the residuary estate after payment of each instalment of the annuities was during the period of 21 years from the death of the testator accumulated under the power of accumulation contained in the will, and after the expiration of that period it had been divided between the testator's next-of-kin:—

Held, that surplus income arising in the period between 21 years after the death of the testator and the death of the last annuitant might not lawfully be accumulated, since (1) section 164 of the Law of Property Act, 1925, applied to a power, as well as a direction, to accumulate which, if unlimited in form, though not necessarily bad in itself, could not be lawfully exercised for longer than 21 years from the death of the testator; and (2) there was here an implied trust to accumulate on the principle of *In re Coller's Deed Trusts* [1939] Ch. 277; 53 T.L.R. 859; [1937] 3 All E.R. 292, although the annuities were to be paid "out of the annual "income"; and that on the principle set out in *Berry* v. *Geen* [1938] A.C. 575; 54 T.L.R. 703; [1938] 2 All E.R. 362, the surplus income so arising was undisposed of and devolved on the next-of-kin.

ADJOURNED SUMMONS.

The testator, John Robb, who died on November 25, 1916, by his will, dated September 7, 1916, devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and upon trust out of the proceeds of sale and his ready money, to pay all his debts, funeral and testamentary expenses, and he directed his trustees to invest the residue thereof in or upon such stocks, funds, shares or securities as should be authorized by law, "and out of the annual income thereof I "direct my trustees to pay to my wife during her life an annuity "of £120 commencing from my death by monthly payments and "to my said daughter Alice during her life an annuity of £52 "commencing from my death by monthly payments and after "the deaths of my said wife and daughter I direct my trustees "to stand possessed of my residuary estate and of the invest- "ments for the time being representing the same in trust for all "my grandchildren who shall be living at my death or any of "them born at any time afterwards and who being male attain "the age of twenty-five years before the expiration of twenty- "one years from the death of the survivor of my said wife and "daughter or being female attain the age of twenty-five years or "marry before the expiration of such twenty-one years if more "than one in equal shares. I empower my trustees to accumulate the surplus income (if any) of my residuary estate at "compound interest by investing the same and the resulting "income thereof in any investments hereby authorized with "power from time to time to vary such investments at their "discretion. I declare that my trustees may pay or apply the "whole or any part at their discretion of the income or the "capital of the share to which my grandson, James, shall for "the time being be entitled in expectancy and would if of the "age of twenty-five years be entitled in possession under the "trusts hereinbefore declared for or towards his maintenance, "education, advancement or benefit and shall invest the surplus "income (if any) in any such investments as are hereby "authorized in augmentation of the capital of such share."

The testator's widow died on December 9, 1921, and the only subsisting annuity was that of £52 a year payable to his daughter, the first defendant to this summons.

The testator had three children, a daughter, the first defendant, and two sons, one of whom died on October 7, 1923, and the other on June 7, 1944. He had 15 grandchildren, of whom 12 were still living, and all of these had attained the age of 25. Of the remaining three grandchildren, one died after attaining the age of 25, and two had died under that age.

The annuity given by the will to the testator's widow was duly paid during her life, and the annuity given by the will to the first defendant had been duly paid.

The surplus income of the residuary estate after payment of each instalment of the annuities was during the period of 21 years from the death of the testator accumulated under the power of accumulation contained in the will, and after the expiration of that period it had been divided between the testator's next-of-kin.

Doubts having arisen whether the trustees had adopted the correct course in distributing the surplus income in view of the fact that the provision for accumulation contained in the will was a power and not a trust, the present summons was taken out to ascertain, inter alia, whether such surplus arising after the expiration of 21 years from the death of the testator and pending the death of the first defendant ought to have been and be held by the trustees upon trust for the next-of-kin of the testator as under a partial intestacy, or upon trust to divide it between the grandchildren of the testator in the manner therein set out or upon some other and what trusts.

H. Hillaby for the plaintiff.

H. A. H. Christie Q.C. and *G. B. H. Dillon* for the next-of-kin. It is well settled by the authorities that, where there is a trust to accumulate, any surplus income goes to the next-of-kin. It is submitted that this principle also applies in cases where there is a power to accumulate.

Section 164 of the Law of Property Act, 1925,[1] is concerned with provisions which result in accumulation and, therefore, it would seem that the section applies to both a trust and a power to accumulate.

The will, on its true construction, gives to the annuitants a continuing charge on the income of the testator's residuary estate, and the grandchildren are given nothing until the death of the last annuitant. Accordingly the provisions of this will, in this respect, come within the principle of *In re Coller's Deed Trusts* [2]; in the event of the income of the residuary estate being insufficient to pay the annuities in any particular year, the annuitants would be entitled to have their annuities made up out of the income of previous or subsequent years, and that possibility would of necessity involve the trustees in accumulating income until the death of the last of the annuitants.

The gift to the grandchildren, as it is a future residuary bequest which is vested, does not carry the intermediate income, but surplus income, which arises after the period of 21 years from the death of the testator and until the death of the last of the annuitants, devolves on the next-of-kin on the principle set out in *Berry* v. *Geen* [3]; see also *Weatherall* v. *Thornburgh* [4] and *In re Gillett's Will Trusts.*[5]

[They also referred to *Green* v. *Gascoyne.*[6]]

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[1] Law of Property Act, 1925, s. 164: "(1) No person may by any "instrument or otherwise settle or "dispose of any property in such "manner that the income thereof "shall, save as hereinafter mentioned, be wholly or partially "accumulated for any longer period "than one of the following, namely:— ". . . (*b*) a term of 21 years from "the death of the . . . testator. . . . "In every case where any accumulation is directed otherwise than as "aforesaid, the direction shall (save "as hereinafter mentioned) be void; "and the income of the property "directed to be accumulated shall, so "long as the same is directed to be "accumulated contrary to this section, go to and be received by the "person or persons who would have "been entitled thereto if such accumulation had not been directed. . . . "(3) The restrictions imposed by this "section apply to instruments made "on or after the twenty-eighth day of "July, eighteen hundred, but in the "case of wills only where the testator "was living and of testamentary "capacity after the end of one year "from that date."

[2] [1939] Ch. 277, 281, 282.

[3] [1938] A.C. 575.

[4] (1878) 8 Ch.D. 261.

[5] [1950] Ch. 102.

[6] (1864) 4 De G.J. & S. 565.

B. L. Bathurst Q.C. and *D. S. Chetwood* for a representative grandchild. In this will there is no trust to accumulate but only a power. It is submitted that section 164 of the Law of Property Act, 1925, does not apply to a power of accumulation, for by implication a power connotes that accumulation need not necessarily be carried out. On the language of section 164 (1) it is plain that the section is only concerned with provisions for accumulation which cast on the trustees an absolute obligation to carry them out. The use of the words " shall," " direction " and " directed " makes it plain that the first limb of section 164 (1), " No person " may by any instrument or otherwise settle or dispose of any " property in such manner that the income thereof shall . . . be " wholly or partially accumulated for any longer period than one " of the following . . . ," must be construed as though it read: " No person may by any instrument or otherwise settle or dispose " of any property in such manner that the income thereof must " . . . be wholly or partially accumulated. . . ." In other words, the mischief at which the section is aimed is directions for accumulations, that is, a duty given to the trustees which it is incumbent upon them to carry out. The object of the Accumulations Act, 1800, which is the predecessor of section 164 of the Act of 1925, was to limit the time within which the ultimate dispositions of a deceased person might vest. In the present case there has been no attempt to circumscribe that object, for the testator by empowering his trustees to accumulate has vested in living persons a discretion whether or not they will exercise this provision. Further, *Lombe* v. *Stoughton* [7] and *Bridgnorth Corporation* v. *Collins* [8] are authority for the proposition that section 164 does not apply to all provisions for accumulation. It follows therefore that the trustees were under no statutory obligation to end the accumulation of income after the period of 21 years from the death of the testator.

The grandchildren are entitled to the intermediate income save in so far as in any particular year it was or is not required for the payment of the annuities. The provision that the annuities are to be paid out of the " annual income " of the residuary estate means the income of any particular year. Accordingly, the annuities have no continuing charge upon the whole of the income until the death of the last annuitant. *Berry* v. *Geen* [9] is distinguishable; in that case there was a direction to accumulate for longer than the statutory period.

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[7] (1841) 12 Sim. 304.

[8] (1847) 15 Sim. 538.

[9] [1938] A.C. 575.

[They also referred to *Lill* v. *Lill*[10]; *In re Maber*[11]; *In re King*[12]; *In re Coller's Deed Trusts.*[13]]

Raymond Jennings Q.C. and *B. S. Tatham* for the grandchild James named in the will. By virtue of the special provisions in the will in regard to James he takes a vested share in possession at the age of 25, and accordingly his rights under the will are not affected by the exercise of the power of accumulation. It is submitted, however, that the language of section 164 of the Law of Property Act, 1925, prevents the trustees from accumulating income after the period of 21 years from the death of the testator.

On the construction of this will there is an immediate gift to the grandchildren subject only to the interests of the annuitants. The present case is the converse of *In re Jobson.*[14]

It is submitted that the effect of the decision in *Berry* v. *Geen*[15] is that if there is a trust to accumulate income during the life of A, and after his death there is a gift over, then its determination during the life of A results in the acceleration of subsequent interests.

[They also referred to *In re King*[16]; *In re Maber.*[17]]

Christie Q.C. replied.

Danckwerts J. [having stated the facts]: The income has been accumulated, so far as not required for the annuities, for a considerable period, and it has been suggested that from 21 years after the death of the testator, that is, from the year 1937, no further accumulation should be authorized, having regard to the provisions of section 164 of the Law of Property Act, 1925, or the provisions of the Accumulations Act, 1800, which were in similar terms.

That was submitted by Mr. Christie, for the next-of-kin, and by Mr. Jennings, for the grandson James; but the unlawfulness of such accumulation was contested by Mr. Bathurst, on behalf of a representative grandchild, who argued against an intestacy.

Mr. Bathurst submits that there is no express trust for accumulation in this will, which is true; but there is, of course, a power of accumulation; it is contended by Mr. Bathurst that a power to accumulate is not in any way contrary to the provisions of section 164 of the Law of Property Act, 1925. [His Lordship read the section and continued:] Mr. Bathurst contends that a power to accumulate connotes that accumulation need not necessarily be carried out; and that, in any event, it is not a direction to accumulate; and that therefore section 164 of the Law of Property Act, 1925, does not apply. I am unable to accept that argument. There is not only a reference towards the end of subsection (1) to directions for accumulation, but that subsection begins: "No person may by "any instrument or otherwise settle or dispose of any property "in such manner that the income thereof shall . . . be wholly "or partially accumulated for any longer period" than those specified. It seems to me, therefore, that whilst a power to accumulate unlimited in form need not be necessarily bad in itself, it could not be exercised lawfully by the persons to whom such a power has been given, in the present case the trustees, so as to accumulate for a longer period than 21 years from the death of the testator; and that any other result would be contrary to the prohibition which is contained in the opening words of subsection (1) of section 164.

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[10] (1857) 23 Beav. 446.

[11] [1928] Ch. 88.

[12] [1928] Ch. 330.

[13] [1939] Ch. 277.

[14] (1889) 44 Ch.D. 154.

[15] [1938] A.C. 575.

[16] [1928] Ch. 330.

[17] [1928] Ch. 88.

There is a further difficulty in the present case. The rights of annuitants have been laid down in very plain terms in *In re Coller's Deed Trusts* [1] by Romer L.J., delivering the judgment of the Court of Appeal, and as the annuitants in the present case are given the benefit of a continuing charge on the income of the testator's residuary estate, they are entitled to have the arrears of the annuities in any particular year, should the income be insufficient, made up out of the income of subsequent or past years; and, consequently, that would necessarily involve an accumulation, according to the principles laid down in that case, of the income of the residuary estate until finally the fund was released by the death of the last of the annuitants. There is, therefore, apart from anything else, an implied trust for accumulation, unless the provisions in this particular will amount to a charge upon the income of each particular year only in respect of the annual sum payable in that year. In the present case the words are "out of the annual income" to pay an annuity to the wife and an annuity to the daughter. It was suggested that "annual income" meant the income of any particular year. I do not think that that is the proper construction. In my opinion "annual income" is equivalent for this purpose to income; all income is annual for the purpose of administration, and it seems to me, therefore, that there are no special terms in this will which prevent the annuitants from having a continuing charge upon the whole of the income until the last of the annuitants has died; and, consequently, in my judgment, there is an implied trust for accumulation, and it is well settled that the provisions of section 164 of the Law of Property Act, 1925, apply to implied as well as express declarations for accumulation: see *Tench* v. *Cheese* [2] and *Mathews* v. *Keble* [3]; accordingly, the contention in the present case that any accumulation could lawfully be made after the expiration of 21 years from the death of the testator fails.

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[1] [1939] Ch. 277, 281, 282; 53 T.L.R. 859; [1937] 3 All E.R. 292.

I now have to consider the question what is to be done with the income from the time when the accumulation ceased to be lawful. One contention which has been put forward was that the income as from that date should be divided among the grandchildren who had obtained a vested interest by attaining the age of 25 years. The alternative view to the grandchildren taking is that there is an intestacy; so that the income until the death of the last annuitant must be divided between the next-of-kin of the testator according to the law of intestacy. It is to be observed that this is not a case where the residue is given to a class who may have to qualify by satisfying certain conditions; there is simply a direction for the payment of the annuities out of the annual income of the residuary estate, and then there is no gift of the residue whatever until one comes to the words "after the "deaths of my said wife and daughter"; and then, and then only, the trustees are directed to stand possessed of the residuary estate upon trust for the relevant grandchildren.

It is true that there is a peculiar provision in respect of James to be found in the will; it is obviously a power of advancement and maintenance which was no doubt necessary in the year when the will was made, because section 43 of the Conveyancing Act, 1881, did not apply; but I am unable to gain any real assistance from it on the construction of this will.

A number of authorities have been cited to me, but many of them seem to me not to be in point. In particular, in my opinion, *In re Maber*,[4] which was relied on for the grandchildren, is a different case from the present. It is not an easy case to understand, and I do not find that I am assisted by it.

I find it impossible to distinguish the present case from *Berry* v. *Geen*.[5] In that case there were a large number

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[2] (1855) 6 De G.M. & G. 453.

[3] (1868) L.R. 3 Ch. 691.

[4] [1928] Ch. 88.

[5] [1938] A.C. 575; 54 T.L.R. 703; [1938] 2 All E.R. 362.

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of annuities directed to be paid, and also there was an express direction for accumulation which is not to be found in the present case. The report of that case states: " . . . and, subject as " aforesaid, [the testator] gave the whole of his property after " the death of the last personal annuitant to the Congregational " Union of England and Wales to be invested as capital. . . ." In the course of his speech Lord Maugham L.C. said[6]: " On the " other hand, there may no doubt be cases where the final gift " of residue is so worded as to include all income not effectually " disposed of in the preceding dispositions. In the present case " such a construction seems to me to be impossible, since it is clear " that the Congregational Union is given nothing until the death " of the last personal annuitant. The words ' after the death of " ' the last personal annuitant ' cannot be disregarded; and it is " to be observed that the phrase is in effect a repetition of the " previous sentence ' and on the death of the last personal annui- " ' tant ' which introduces the gifts of pecuniary legacies to the " four named Congregational Churches. It follows that, unless " the accumulations can be stopped, the released income down " to the death of the last surviving personal annuitant will pass " as on an intestacy to the next-of-kin and the heir-at-law."

In the present case it seems to me that nothing is given to the grandchildren until the death of the survivor of the testator's widow and daughter who are given annuities; there are no appropriate words, so far as I can see in the present case, which would take the will which I have to consider outside the principles which have been laid down by Lord Maugham. Therefore, in my opinion, the income which may not lawfully be accumulated is not given to the grandchildren—I say nothing about the accumulations which may lawfully be made—but is undisposed of and goes to the next-of-kin.

Declaration accordingly.

Solicitors: *Hyde, Mahon & Pascall, for Keenlyside & Forster, Newcastle-upon-Tyne; A. H. Headley, Leicester.*

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[6] [1938] A.C. 575, 582.

1953
Apr. 16.

Roxburgh J.

In re HOLDER, DECD.
NATIONAL PROVINCIAL BANK LD. *v.* HOLDER.

[1952 H. 4580.]

Will—Capital or income—Accrued increase in value at testator's death of National Savings Certificates—Whether such increase "dividends interest or moneys of the nature of income."

A testator, who died on September 21, 1951, directed by his will: "I expressly declare that no part of any dividends rents "interest or moneys of the nature of income which shall actually "be paid after my death shall be apportioned or treated as capital "of my estate and I declare that the whole thereof . . . shall "belong to the person entitled to the investment or property from "which the same respectively arose . . ."

In 1940 the testator purchased 500 units of National Savings Certificates, seventh issue, at the price of 15s.: the whole costing £375. On February 8, 1952, after his death, his trustees received payment of £534 7s. 6d., representing the original principal sum of £375, plus £159 7s. 6d. increased value in accordance with the terms of issue.

According to those terms, "interest" was to be "added" at first yearly, and then monthly, with a bonus at the end of the fifth and tenth years. No income tax was payable in respect of the "interest" so "added." There were statements that a certificate "cost 15s. and became worth 20s. 6d. in ten years" at a stated "rate of growth," and "after short notice, certificates may "be cashed at any time . . . the owner receiving whatever interest "is due."

A summons was taken out to ascertain whether the increase in value of the certificates accruing during the testator's lifetime, or after his death, constituted capital or income under the terms of the will. It being conceded that the increase in value after the testator's death must be income:—

Held, that the monthly accretions were capitalized at the end of each month, unless the holder before the end of the month called for repayment: so that so much of the gross sum received by the trustees as represented the value of the certificates at the testator's death was to be treated as capital.

ADJOURNED SUMMONS.

Ernest Cyril Coulthurst Holder, who died on September 21, 1951, by his will provided: "I expressly declare that no part "of any dividends rents interest or moneys of the nature of "income which shall actually be paid after my death shall be "apportioned or treated as capital of my estate and I declare "that the whole thereof (whether the same be paid in respect "of a period wholly or only partly prior to my death) shall "belong to the person entitled to the investment or property "from which the same respectively arose and if there shall be "a tenant for life of such investment or property such dividend "rent or interest shall become payable to such tenant for life "and I further declare that any bonus or bonuses which may "from time to time be declared in respect of any shares or "stock subjects of the trusts hereof shall be applied as and be "deemed to be income arising from such shares or stock."

On June 12, 1940, the testator purchased 500 units of National Savings Certificates, seventh issue, at 15s. each, paying in all £375. In 1950, when the normal 10-year period expired, he continued to hold the certificates under the terms applicable to certificates so retained. After his death, on February 8, 1952, his trustees received the sum of £534 7s. 6d. in respect of the certificates; that is, the original principal £375 with accretions amounting to £159 7s. 6d. which had been added in accordance with the terms of issue.

The leaflet embodying these terms contained the following expressions: "Put your savings into National Savings Certificates. See how they grow in value. A National Savings "Certificate costs 15s. and becomes worth 20s. 6d. in 10 years "at the following rate of growth. At the end of the first year "3d. interest is added. Thereafter ½d. is added at the end of "each completed period of one month up to the end of the "tenth year. A bonus of 3d. is added at the end of the fifth "year, and a further bonus of 6d. at the end of the tenth year. "This represents a rate of interest of £3 3s. 5d. per cent. per "annum over the whole period of 10 years. . . . The growth "in value of Savings Certificates (Seventh Issue) . . . Value "after one year . . . 15s. 3d. . . . Points to note . . . no income "tax is payable on the interest of certificates, and the interest "they earn need not be included in any income tax return. . . . "After short notice, certificates may be cashed at any time "provided the holder is not under seven years of age, the owner "receiving whatever interest is due."

The trustees took out a summons for the determination of the question whether the accretion of £159 7s. 6d. ought to be treated as capital or income, having regard to the terms of the will.

D. A. Ziegler for the trustees.

J. A. Plowman for a tenant for life. The accumulation was "interest," that is, "moneys of the nature of income," within the terms of the will; it was not paid until after the death of the testator, and accordingly should be treated as income.

The contention that this is interest is supported by the language of section 191 of the Income Tax Act, 1952, which exempts from income tax the "accumulated interest" on National Savings Certificates: see also art. 40 (1) of the Savings Certificate Regulations, 1933,[1] which provides: "'Amount repayable,' in "relation to any certificate, includes any interest which has "accrued due in respect of that certificate."

Although under the terms of the issue the interest cannot be withdrawn without withdrawing capital as well, it remains interest none the less.

N. S. Warren for a further tenant for life. The prospectus is admittedly a confused document, couched in popular language, but it contains the statement that "certificates may be cashed "at any time, the owner receiving whatever interest is due." That statement clearly supports the contention that the monthly or yearly additions constitute "interest."

T. A. C. Burgess for the remaindermen. The scheme disclosed by the prospectus is that from time to time interest is credited and added to the capital, so that the yearly or monthly credits made during the testator's lifetime were capitalized at the end of the year or month in question.

Accordingly, all the interest accrued during the testator's lifetime had been capitalized at his death, but it is not contended that, under the terms of the will, interest accruing after his death should be treated as capital.

ROXBURGH J. This is a difficult point of some general importance. [His Lordship stated the facts and continued:] Mr. Burgess conceded (and I think that he was bound to concede) that any interest earned by these National Savings Certificates after the death of the testator must be income. I think that he was bound to concede that, although this was a lump sum payment, and there is no direction in this clause to unscramble such payments. However, I think that he would have been in grave difficulty if he had not made that concession and, as he has made it, I need say no more about it.

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[1] S.R. & O., 1933, No. 1149.

That National Savings Certificates earn income is beyond doubt. It is beyond doubt that, if they are not encashed, the income accumulates; and that accumulating interest, or accumulated interest, is not subject to income tax by virtue of section 191 of the Income Tax Act, 1952. But that does not solve my problem, for in my judgment the question is—and I regard it as a difficult question—whether that portion of the lump sum payment actually received by the bank after the testator's death comprised any " dividends rents interest or moneys of the nature " of income."

Now it certainly did comprise moneys in the nature of income, unless they had been effectively capitalized by agreement between the testator and the Government—that is to say, the authority issuing the savings certificates—before his death; because they certainly once had been of the nature of income. The question is whether they had been capitalized during his lifetime so as to lose the character of moneys of the nature of income.

I regard that as a very difficult question, which is not made easier by some ambiguities in what I may call the prospectus of the seventh issue of National Savings Certificates, which obviously was intended to be couched in popular language and clearly did not envisage this point. The material part of this prospectus is as follows: " Put your savings into National Savings " Certificates. See how they grow in value." There, " they " must mean, in my view, the corpus, the National Savings Certificates. Then: " A National Savings Certificate costs 15s. and " becomes worth 20s. 6d. in 10 years at the following rate of " growth." Now that must be the growth of the corpus. " At " the end of the first year 3d. interest is added." That, I understand to mean, interest is deemed to be paid and is added to the corpus. " Thereafter ½d. is added at the end of each " completed period of one month up to the end of the tenth " year." There again, I think that that must mean added to the corpus. " A bonus of 3d. is added at the end of the fifth " year, and a further bonus of 6d. at the end of the tenth year." I think that the bonus must be regarded as an income bonus in its inception, but there again, it is, under the terms of issue, added to the corpus. " This represents a rate of interest of " £3 3s. 5d. per cent. per annum over the whole period of 10 " years." It is to be noticed that it says " this represents a "rate of interest," which is not the same thing as saying "this "is interest over the whole period of 10 years."

Then comes a table headed: "The growth in value of "Savings Certificates (Seventh Issue)." Again, that means surely, the growth in value of the corpus. The certificate costs 15s., and we see: "value after one year . . . 15s. 3d."

All that seems to me to point to the view that, unless the purchaser encashes his certificate, interest is deemed to be paid but added to the corpus by the agreement between the purchaser and the Government, embodied in the terms of issue.

On the back of the form are "Points to Note." No. 2 says: "No income tax is payable on the interest of certificates, and "the interest they earn need not be included in any income tax "return." That, of course, is a reference to what now is section 191 of the Income Tax Act, 1952, and then was a corresponding provision in an earlier statute; but that does not affect the question, because, in my judgment, there is no doubt that it is interest in its inception. The whole question is whether it has been, by agreement, capitalized before the testator's death.

There are some sections in the Savings Certificate Regulations, 1933, which indicate a point that is not in dispute with regard to interest, but there is nothing that I can find in those regulations which bears on the present question. However, at the end of "Points to Note" on the prospectus there is one which seems to me to be at variance with the general tenor of the prospectus on this point. It says: "After short notice, certificates may be cashed at any time provided the holder is not "under seven years of age, the owner receiving whatever interest "is due."

Of course, that does point in the opposite direction. That points to the fact that the interest is never capitalized; in other words, that the arrangement is a sort of agreement to pay interest at a rate referable to the intervening period but payable only on the termination of the holding. In my judgment, that view, though it does receive support from the point cited, is quite at variance with the whole of the rest of the tenor of the prospectus; and though I think the point is difficult, in my judgment there is an agreement between the purchaser of savings certificates of that issue and the Government that, unless the holder encashes them, a sum shall be added to the principal

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month by month; with the result that at the end of each completed month the addition is capitalized, unless the holder before the end of the month calls for repayment.

I will accordingly declare that so much of the £534 7s. 6d. received by the bank on February 8, 1952, in respect of the savings certificates in question as represents the value of such certificates on the date of the death of the testator is capital, and that the balance is income.

Declaration accordingly.

Solicitors: *Collyer-Bristow & Co.; Stibbard, Gibson & Co.; Waterhouse & Co.*

F. R. D.

1953 *Feb.* 20.

Vaisey J.

In re WALSH. WALSH *v.* WALSH.

[1948 W. 3224.]

Will—Construction—" Movables "—Gift of " all . . . my furniture and " movables . . . not consisting of mortgages shares bonds or securities . . . to my wife absolutely "—Prohibition against sale by wife of " anything whatever left to her by this clause "—Whether " movables " inclusive only of movable chattels.

A testator by his will provided: " I give to my wife Phyllis " a legacy of £200 free of legacy duty. All the remainder of my " furniture and movables not hereby specifically disposed of not " consisting of mortgages shares bonds or securities of any kind I " give to my wife absolutely, subject only to the condition that " if she should sell anything whatever left to her by this clause, " the proceeds of such sale shall immediately pass to and vest in " my executors and trustees and form part of my residuary estate. " The residue of my real and personal estate I give to my trustees " in trust to pay the income thereof to my wife for her life. . . . " After the death of my wife the residue of my estate to go to my " three children in equal shares. . . ."

On the hearing of a summons taken out to ascertain the ambit of the gift of " movables ":—

Held, (1) that the words " not consisting of mortgages, shares, " bonds or securities of any kind " could not impart into the word " movables " a meaning to make it include anything beyond movable chattels.

Semble, they were an echo in the testator's mind of the common form gift of chattels " other than money and securities for money " and that he put them in the will in error and ex abundanti cautela,

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because mortgages, share certificates, bonds and securities were physically movable and he did not intend them to be included.

(2) That, accordingly, the gift of "movables" in the context of this will did not include a sum standing to the testator's credit with his bank at the date of his death, or his insurance policy and the sum payable under it, or a sum accrued in respect of his pension, or moneys representing income accrued at his death, on bonds and shares, or moneys representing income accrued at his death under a trust created in his favour by a will, or sums paid or payable in respect of war damage, or any sum due at his death and paid to his personal representatives.

Steignes v. *Steignes* (1730) Mos. 296, and principle stated in Jarman on Wills, 8th ed., at p. 1001 considered.

ADJOURNED SUMMONS.

By his will dated February 15, 1939, Sir Cecil Henry Walsh K.C. (hereinafter called "the testator"), who had been a judge of the High Court of Allahabad from about 1915 until his retirement in 1928, and who thereafter continued to take a keen interest in legal matters, including questions of Indian law, provided, inter alia: "I give to my wife Phyllis a legacy of £200 free of "legacy duty. All the remainder of my furniture and movables "not hereby specifically disposed of not consisting of mortgages "shares bonds or securities of any kind I give to my wife absolutely, subject only to the condition that if she should sell "anything whatever left to her by this clause, the proceeds of "such sale shall immediately pass to and vest in my executors "and trustees and form part of my residuary estate. The residue "of my real and personal estate I give to my trustees in trust to "pay the income thereof to my wife for her life without power "of anticipation or of disposing of it or of any part thereof except "the income arising therefrom. It may be realized or retained "in its existing form, or reinvested in such securities whether "authorized by the Trustee Acts or not, as my executors or the "survivor of them may in their absolute discretion decide. After "the death of my wife the residue of my estate to go to my "three children in equal shares, but if either (sic) of them should "predecease her leaving children the share of my child so "deceased is to go to his or her children who may be living at "the death of my wife in equal shares. If either (sic) of my "three children should predecease my wife and no child of him "or her should be living at the date of my wife's death, the share "which would have gone to him if he had survived my wife is "to go to the others of my three children who shall be then living "in equal shares."

The will was made by the testator himself without assistance. On May 14, 1945, the testator made a codicil to the will not material to this report, and on November 24, 1946, he died. He had been thrice married and had had children by the first marriage only. His widow was advised that the extent of the gift to her of the residue of his "movables" was uncertain, and accordingly, by this summons, dated November 23, 1948, and taken out by her as one of the executors and trustees of his will, asked whether, on the true construction of the will, she was entitled under that gift to (i) a sum standing at the date of his death to the credit of his estate with his bank; (ii) his insurance policy and the sum payable thereunder; (iii) a sum accrued at the date of his death in respect of his pension as a retired judge of the High Court of Allahabad; (iv) moneys representing income accrued at his death (but paid thereafter) on the bonds and shares then belonging to him; (v) moneys representing income accrued at his death under a trust created in his favour by a will; (vi) a sum already paid, and any sums to be paid after the date of the hearing of this summons, by the War Damage Commission in respect of damage to the testator's house; and (vii) any sums which might have been due to him at his death and which might after the date of the hearing of this summons be paid to his personal representatives by way of return of income tax, post-war credits, director's fees, or on any other account.

One of Her Majesty's counsel who had for 20 years specialized in Indian appeals before the Judicial Committee of the Privy Council and who had been asked to state whether, if Indian law applied to the distribution of the testator's estate, those assets would constitute "movable property" as that term was understood in Indian law, stated in an affidavit that the terms "immovable property" and "movable property" were used very frequently indeed in Indian legal phraseology and that in his opinion all those assets constituted movable property according to Indian law.

G. A. Rink for the widow. "Movables" comprises everything that the testator left except things which are actually immovable. In *Steignes* v. *Steignes*,[1] where the will was in French, the testator provided: "I give to my wife, besides all my movables, "plate, jewels, pictures, linen, etc. (except my three books of "miniature and my library) £6,000 South Sea Stock." In that case the question was, what passed by the French word "meubles," which was translated movables but in the French signified only household goods. Sir Joseph Jekyl M.R. was of the opinion that the word movables in that will comprehended only corporeal movables, "though if there was nothing to "restrain the meaning of it in the will the word would take "in the whole purely personal estate. . . . the testator, by "saying that his wife should have £6,000 South Sea Stock "besides all his movables, shows that, in his understanding of "the word, movables would not comprehend stock, for it would "be absurd to say, she shall have all my stock and £6,000 South "Sea Stock besides. . . ." In the sidenote it is stated: "The "word 'movables,' in its full sense, takes in all personal chattels. "But it extends only to corporeal movables in this will." In Theobald on Wills, 10th ed. (1947), at p. 172, in the third paragraph, it is stated: "Large words, such as goods, chattels, or "effects, when they are followed by an enumeration of particulars, "will not be limited to things ejusdem generis"; and in the last paragraph, under the heading "Express inclusion of particular "things," it is stated: "It seems that the express inclusion in "the large words of some particular property which would have "passed without being expressly included, affords an argument "for excluding from the gift things ejusdem generis with that "included"; and *Steignes* v. *Steignes*,[2] at note 15, is cited in support of that. That case, in which the testator gave to his wife all movables plus certain stock, is the converse of the present case, in which he has given her "all . . . movables not . . . con"sisting of mortgages, shares, bonds or securities of any kind. ". . ." Those words let in the principle, stated in Jarman on Wills, 8th ed., p. 1001, that "a conclusive ground for giving "to equivocal words their larger signification, occurs when the "bequest contains an exception of certain things which such "bequest, according to its restricted construction, would not "comprise; the testator having in such a case afforded a key or "explanation to his own ambiguous language, by showing that "he considered that the bequest would, without the exception, "have included the excepted articles. This question has generally "arisen under gifts of goods and chattels restricted to a certain "locality; but the principle, it is obvious, is equally applicable "to bequests not so restricted." In *Hotham* v. *Sutton*[3] there was a residuary bequest in general terms and a revocation, by a codicil, as to "plate, linen, household goods and other effects "(money excepted)"; and it was held that the words "money "excepted" prevented the restrained (i.e., ejusdem generis) construction of the words "other effects" and that therefore stock, which did not pass under the word "money," was included, with all leasehold and all personal property, except money and banknotes. In *Swinfen* v. *Swinfen* [4] it was held that money in the house at the testator's death passed under a bequest of "movable "goods." In the present case, if the expression "all . . . my "furniture and movables" was not qualified by the words "not "consisting of mortgages, shares, bonds or securities of any kind," the ejusdem generis rule would apply and "movables" would mean only movable chattels. The qualifying words, however, show that the testator thought that mortgages, shares, bonds and securities would have passed under the bequest if he had not excluded them, and they afford, therefore, in the words of the principle enunciated in Jarman, "a conclusive ground for giving "to equivocal words their larger signification," i.e., in the present case, for construing the words "movables" as including, besides corporeal movables, all the items here in dispute, none of which are mortgages, shares, bonds or securities. The sum standing at the testator's death to the credit of his estate with his bank and his insurance policy and the sum payable under it will go to the widow.

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[1] (1730) Mos. 296.

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[2] Mos. 296.

[3] (1808) 15 Ves. 319.

[VAISEY J. Surely the insurance policy is included in the word "securities" in the exception?]

It is submitted not. The word "security" is never used to mean an insurance policy. Here it is used with "mortgages, "shares" and "bonds" and is meant to cover what those do not include, e.g., debentures. Also, among the disputed items, a debt is a movable in the legal sense. The sum accrued at the date of the testator's death in respect of his pension as a judge is in the same position as an ordinary debt. He would have considered himself as entitled to his pension, even if he had strictly no right to enforce payment of it. Also in the same position as an ordinary debt are moneys representing income under a trust in his favour, post-war credits and value payments made or to be made by the War Damage Commission. The testator may have used the word "movables" in the will in a sense in which he had come to know it during his term of office as a judge in India. There is before the court expert evidence that all these disputed items are " movable property " in Indian law.

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[4] (1860) 29 Beav. 207.

C. R. D. Richmount for the testator's children (one of whom was the other executor and trustee of the will) and grandchildren. The will ought not to be construed in a way contrary to the testator's clear intention. " Movables " means " things which can " be moved," i.e., movable chattels only; and it is to be noted that he did not use the word " immovables " in the will. He had already given his wife a legacy, which he need not have done if the word " movables " had the meaning now contended for on her behalf. That meaning, also, would make nonsense of the forfeiture clause in the will. It is submitted that the testator's insurance policy is comprised in the word " securities." If, however, that is not so, the moneys payable under it are in any event choses in action not accruing until after his death: *Chapman* v. *Hart.*[5] The widow is not entitled, under the gift of the residue of the movables, to any of the items now in dispute.

VAISEY J. The will is inartistically framed. The testator was familiar with legal phraseology up to a point, but there are indications that his absence from England had caused him to forget many principles which he ought to have borne in mind.

I have to decide what is the meaning of " movables." Had the word stood alone, *Steignes* v. *Steignes*[1] might have been decisive, and " movables " would have meant the residuary personal estate. That decision was given more than 200 years ago and so far as I am aware the word " movables " in a will has never been construed from that day to this. The words " furniture and movables " would by themselves have limited the meaning of the word movables to " movable chattels." On the other hand, we find the words " not consisting of mortgages " shares bonds or securities of any kind," by which there seems to be introduced the principle stated at p. 985 of the 7th edition, and at p. 1001 of the 8th edition, of Jarman on Wills:—" A " conclusive ground for giving to equivocal words their larger " signification, occurs where the bequest contains an exception " of certain things, which such bequest, according to its restricted " construction, would not comprise; the testator having in such a " case afforded a key or explanation to his own ambiguous " language, by showing that he considered that the bequest would,

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[5] (1749) 1 Ves.Sen. 271.

[1] Mos. 296.

"without the exception, have included the excepted articles. "This question has generally arisen under gifts of goods and "chattels, restricted to a certain locality; but the principle, it "is obvious, is equally applicable to bequests not so restricted."

Is the word "movables" to be limited by the ejusdem generis rule or do the added words extend its ambit? It is to be remembered that the testator left the residue of his real and personal estate on certain trusts, so that the word "movables" cannot mean the whole of his personal estate. Also, the widow is given a legacy of £200, a circumstance which further supports the argument that what is given to her "absolutely" consists simply of the movable chattels.

What I have to do is simply to construe the will: and, although the provision against any sale by the widow is inoperative, I do think that it throws a great deal of light on what is said to be left to her by the clause, since it cannot extend to money in the bank or in the house.

The words "not consisting of mortgages shares bonds or "securities of any kind," which cause the difficulty in this case, were, I think, a sort of echo in the testator's mind of the common form gift of chattels "other than money and securities for "money." They were put in, I think, in error and ex abundanti cautela because mortgages, share certificates, bonds and securities of any kind are physically movable and the testator did not intend them to be included. I do not think that they can import into the word "movables" a meaning to make it include anything beyond movable chattels. I am asked, for example, whether the word "movables" includes a specified sum standing to the testator's credit at his bank at the date of his death. It does not: nor does it include his insurance policy and the sum payable thereunder; or the sum accrued at his death in respect of his pension as a retired judge of the High Court of Allahabad. War damage payments may be choses in action or statutory debts, but are not on any view movables. Neither these nor any of the other items listed in the question raised by the summons could be "movables" here. The common-sense view of the matter is that the testator would not have inserted the provision against selling if he had intended the word "movables" to include anything other than movable chattels.

It is suggested that the testator's use of the word "movables" is in some way reminiscent of his career and experience as a judge in India, where, according to evidence given on affidavit in the present case by one of Her Majesty's counsel who, for

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long, specialized in Indian appeals before the Judicial Committee of the Privy Council, all these assets constitute movable property according to Indian law. It may be that the testator remembered the word and used it with some sort of reminiscence of what it meant. He did not, however, use also the word "immovables"; and I do not think that, even if he had also used that word, the wider meaning could be attributed to the word "movables" in its present context.

For these reasons the widow, in my judgment, is not on the true construction of the will entitled, under the gift therein of the residue of the testator's movables, to any of these items.

Order accordingly.

Solicitors: *Nickinson & Co.; Swepstones.*

K. R. A. H.

C. A.

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Apr. 30.

Evershed M.R., Birkett and Romer L.JJ.

In re A SOLICITOR.
In re A TAXATION OF COSTS.

[1952 W. No. 4428.]

Solicitor—Costs—Lump or gross sum charge—Remuneration and disbursements included in one lump sum charge—Whether client entitled to itemized bill more than six months after lump sum charge paid—Solicitors' Remuneration Order, 1882 (*General Order of* 1882), *art.* 2 (*c*)—*Solicitors Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *ss.* 64, 66—*Solicitors' Remuneration* (*Gross Sum*) *Order,* 1934 (*S.R. & O.* 1934, *No.* 548 (L. 13)), *art.* 1.

The Solicitors' Remuneration Order, 1882 (General Order of 1882) and the Solicitors' Remuneration (Gross Sum) Order, 1934, are directed to remuneration as distinct from disbursements, and the Order of 1934 does not authorize the delivery of a lump sum charge including together, and without distinguishing between the two, both profit costs and disbursements, and, in the absence of some express authority so to do, a solicitor cannot, under the Solicitors Act, 1932, or under any other order, justify his having done so.

Where, therefore, solicitors acting for executors delivered an administration account which showed as due to themselves for "legal "charges and disbursements, £735," that was not a charge which fell within the terms of, and could not be justified by reference to, the Order of 1934. Accordingly, no bill had in fact been delivered at all, and inasmuch as on the facts the recipients had not by their conduct deprived themselves of the right to have a proper bill, the court, in the exercise of its discretion, made an order that an

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itemized bill should be delivered, notwithstanding that the recipients had in fact paid the solicitors and allowed about three years to elapse before objecting and questioning the payment.

In re a Solicitor [1947] Ch. 274; 63 T.L.R. 249; [1947] 1 All E.R. 369 distinguished on the facts.

The question whether the inclusion of an item of a general nature in respect of solicitors' costs in an administration account amounted to the delivery of a lump or gross sum charge within the Order of 1934 considered but not decided.

Decision of Vaisey J. reversed.

Appeal from Vaisey J.

The testator, Edgar Louis East, who died on June 15, 1946, by his will appointed his wife, Mrs. Florence Grace East, and his son, Edgar W. East (hereafter called Mr. East), the applicants, to be his executors and trustees and gave his residuary estate to them upon trust for Mrs. East for life and after her death for division between his children. Mr. East instructed the respondent firm of solicitors, Messrs. Percy Walker & Co., to take out probate on his behalf and on behalf of Mrs. East and to act in the administration of the estate. A grant of probate was duly obtained, the estate in a corrective affidavit being sworn for probate at £17,700. It included seven leasehold properties in Bentham Road, Hackney, held for terms which had only two years to run, and the administration of the estate involved considerable work in negotiating the surrender of these leases with a view to escaping large claims for dilapidations. Mr. East was serving overseas in the Royal Air Force, and the conduct of the administration was left in the hands of the respondent solicitors. No question was raised as to the propriety of the manner in which they conducted the administration.

In July, 1949, Mr. East received from the respondent solicitors a document, exhibit E.W.E.1, enclosed with a covering letter signed on the firm's behalf. The document was headed: "In the estate of Edgar Louis East, deceased. Statement of "receipts and payments." On the left-hand side was a list of a number of payments beginning with "Hastings Corporation, "Rates," and including such matters as Inland Revenue for estate duty and tax, and one item of payment to another firm of solicitors, Messrs. Speechly, Mumford & Craig, on account of the surrender of the leases of the Bentham Road properties, an item which amounted to £1,022 18s. 11d. The last item on the left-hand side was expressed thus: "To "Messrs. Percy Walker & Co.—Legal charges and disburse- "ments on extracting probate, administration of estate, "Assents and negotiating surrender of the Bentham Road leases, "£735." The last few words in that item referred to the matter in respect of which Speechly, Mumford & Craig had been paid over £1,000. On the right-hand side of the document appeared a number of receipts, including the proceeds of sale of investments, dividends, and return of estate and legacy duty. The receipts did not, however, amount to as much as the outgoings, so that the last item on the right-hand side was a balance figure expressed thus: "Balance of account due to Messrs, Percy "Walker & Co., £260 9s. 7d." The evidence showed that Mr. East was then satisfied with the account as delivered, and he paid the balance figure of £260 9s. 7d. by cheque to the respondent solicitors. Indeed, it appeared that thereafter he continued, and so did Mrs. East, to instruct the respondent solicitors in one or two other matters, and, in so far as testator's estate was settled on Mrs. East for life, in a sense, the conduct of the affairs of the estate was not concluded.

Some three years later, in 1951, Mr. East became the executor of another will. That estate was not so large as the testator's, but in the second case the legal charges of the solicitors acting in the administration were very much less than the figure of £735 which appeared in document E.W.E.1. Mr. East thereupon expressed to the respondent solicitors his doubts whether the figure which he had been charged and which he had paid, or had been treated as having paid, was a proper figure, and he asked to be supplied with details to justify it. The respondent solicitors, in fact, in August, 1952, made out a document which was in form a bill, though it was not delivered as such. That document showed under some five headings the various main subject-matters with which they had dealt on behalf of the applicants as executors of the testator, with lump sums against each head, including a sum of £20 for disbursements, and the effect of the document, broadly, was that, when the permitted 50 per cent increase was added to the remuneration, and when a sum of £20, approximately, for disbursements had also been added, the total charge would have been, if delivered in accordance with that document, £887 9s. That showed on the face of it that the figure, in fact, put in document E.W.E.1 was appreciably less than the actual sums which the firm could have charged if they had strictly adhered to their rights under the Solicitors Act, 1932, and the orders made thereunder. The applicants, however, were still not satisfied with the matter, and by this summons they asked that the matter might be referred to the taxing master for taxation, or, alternatively, that the respondent solicitors might be ordered to deliver to the applicants a detailed bill of charges pursuant to the Solicitors' Remuneration (Gross Sum) Order, 1934.[1]

Vaisey J. dismissed the application.

The applicants appealed.

R. Cozens-Hardy Horne for the applicants. At the hearing before Vaisey J. the question turned on whether the administration account which had been delivered amounted to the delivery of a charge under the Solicitors' Remuneration (Gross Sum) Order, 1934, art. 1.[1] Vaisey J. held that a charge had been delivered and, accordingly, since the applicants had not required the delivery of a detailed bill within six months, in accordance with the proviso to article 1 of the order, they were out of time. It is submitted that he was wrong in holding that the administration account constituted a charge within the order. It did not purport to be a bill. It is submitted that the true view is that a bill was delivered for the first time in August, 1952, and the applicants are entitled to have a detailed bill.

The Order of 1934 does not authorize a solicitor not to send in a bill. It merely authorizes him to deliver a bill with a gross sum charge. Sections 64, 65 and 66 of the Solicitors Act, 1932, impose an obligation on solicitors to deliver a bill. Here no bill was delivered and no payment was made by reference to a bill.

Secondly, if the delivery of the administration account was the delivery of a bill, it is submitted that disbursements should have been charged separately. Scale fees are outside the scope of the Order of 1934. The scale fixed for sealing probate and the disbursements should not have been included in the lump sum charged. Their inclusion prevents the charge being within the

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[1] Solicitors' Remuneration Order, 1882 (General Order of 1882), art. 2 (*c*): ". . . in respect of . . . all other "business the remuneration for which "is not hereinbefore, or in Sch. I "hereto prescribed, the remuneration "is to be regulated according to the "present system as altered by Sch. II "hereto. . . ."

Solicitors' Remuneration (Gross Sum) Order, 1934, art. 1: "Without "prejudice . . . to the powers conferred "upon the solicitor or the party "chargeable with the bill under section 66 of the Solicitors Act, 1932, "the remuneration of a solicitor in "respect of all business regulated by "clause 2 (*c*) of the General Order "of 1882, as amended by any subsequent General Order may, at the "option of the solicitor, be by a gross "sum in lieu of by detailed charges: "Provided that within six months "after delivery of a charge, made "under this Order, whether it has "been paid or not, the client may "require that a detailed bill of "charges shall be delivered. . . ."

Order of 1934. A lump sum charge can be justified only if it relates exclusively to matters falling within article 2 (c) of the Solicitors' Remuneration Order, 1882 (General Order of 1882).[1] [He referred to *In re Street*,[2] *In re Baylis* [3] and *In re a Solicitor.*[4]]

J. P. Hunter-Brown for the respondent solicitors. This appeal concerns the construction of the Order of 1934. There is nothing in that order which requires disbursements to be shown separately. The order authorizes solicitors to charge a lump sum which may include disbursements. The client is entitled to require a detailed bill to be delivered which will show him which part of a lump sum consists of disbursements. It is admitted that the order must be construed against the solicitor. If the administration account did not constitute the delivery of a charge under the Order of 1934, the court has a discretion whether it shall now order the delivery of an itemized bill. It is submitted that after the lapse of three years it would be wrong for the court now to order a bill to be delivered. This case is similar to that decided by Roxburgh J. in *In re a Solicitor.*[4]

Evershed M.R. stated the facts and continued: The question which is raised in this case turns on the language and proper interpretation of the order made under section 56 of the Solicitors Act, 1932, known as the Solicitors' Remuneration (Gross Sum) Order, 1934. [His Lordship read article 1 of the order and continued:] The matter as it was argued before Vaisey J. in the court below turned, as I follow it, upon whether the inclusion of the last item on the left-hand side of the document E.W.E.1 amounted to a "delivery of a charge" within the meaning of the Solicitors' Remuneration (Gross Sum) Order, 1934; for if it did, then manifestly upon the facts the client had not required, within the period stated in the Order, the delivery of a detailed bill, and, the client not having exercised his privilege, it was contended on the solicitors' behalf that it was too late to come now, three years after, and ask for an order under section 64 or section 66 of the Solicitors Act, 1932. The judge came to the conclusion that, by comprehending this item on the left-hand side of the document E.W.E.1, the solicitors had "delivered a charge" within the meaning of the order, and he therefore declined to accede to the applicants' application. For reasons which will presently appear,

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[2] (1870) L.R. 10 Eq. 165.

[3] [1896] 2 Ch. 107.

[4] [1947] Ch. 274; 63 T.L.R. 249; [1947] 1 All E.R. 369.

I do not myself desire or find it necessary to express an opinion on that matter, not the least because we have not heard argument on it from Mr. Hunter-Brown for the solicitors.

Before us another point has arisen which was not considered by the judge and which, in my judgment, is fatal to the contention of the solicitors that delivery of a bill cannot now be ordered by the court. It is this: the item of £735 is, on the face of it, a composite item, to cover not only profit costs and remuneration, but also disbursements. It is true that, as it turns out, the disbursements included in the £735 represented but a small part of that sum, £20 or slightly less. But they might have been much more, and it would have been possible, if Mr. Hunter-Brown's argument is correct, to have lumped together the sum paid to Messrs. Speechly, Mumford & Craig in respect of the surrender of the leases of Bentham Road, the remuneration in respect of which is undoubtedly included in the last item, and so to have given a lump figure not of £735 but of over £1,757. But the question is not what might have been done, but whether what has been done is within the language of the Order of 1934. It is no doubt a narrow point, but I have come to the conclusion that the Order does not authorize the delivery of a charge including together, and without distinguishing between the two, both profit costs and disbursements and then, having done that, to say, if the client does not choose to ask for an itemized bill within six months, that there is no obligation to deliver a bill of costs at all.

In the first place, as Romer L.J. observed during the argument, this Order of 1934 is by way of exception to the general statutory obligation on all solicitors to render a bill in conformity with the provisions of the Act, a bill which would contain detailed charges in respect of all the several matters in respect of which the solicitor was entitled to charge remuneration. Its operation is further limited, according to the terms of the Order itself, by reference to article 2 (*c*) of the Solicitors' Remuneration Order, 1882 (General Order of 1882). Article 2 (*c*) of that order covers such matters as are not comprised in article 2 (*a*) and 2 (*b*), such, for example, as sales, purchases, and mortgages, agreements for leases and leases, for all of which there are scales under Sch. I of that order. Article 2 (*c*), in other words, may be treated as covering classes of non-contentious business for which the scales are inapplicable and for which the solicitor is entitled to charge in accordance with Sch. II. Schedule II, speaking broadly (and with reference to the relevant time to which this matter relates), provides that the solicitor may charge for the various separate pieces of business that he does the several amounts indicated in the schedule. It is, I think, plain that the General Order of 1882 and the Order of 1934 are directed to remuneration as distinct from disbursements, which are not, of course, remuneration at all, but are sums paid out by the solicitor as agent for the client which, on general principles, he is entitled to get back from the client.

Until the Order of 1934 was made, a solicitor, in default of express agreement, was bound to deliver to his client a bill which, although it related to matters within article 2 (*c*), showed in detail the exact charges made for every piece of work the solicitor had done. The Order of 1934 was made to enable a solicitor, in cases where no scales were applicable, to avoid having to show in detail each charge he made for his professional services, but entitled him, instead, to charge for his remuneration a lump sum. It follows, I think, quite plainly from what I have said and from the purposes of the Order of 1934 and its history and background, that it was only concerned with remuneration and that there was nothing in that order which justified a solicitor charging a lump sum to cover both remuneration and expenses; and in the absence of some express authority so to do he cannot, under the Act, or under any other order, justify his having so done. It therefore seems to me necessarily to follow that the item which I have read, " To Messrs. Percy Walker & Co., legal charges and disbursements, £735," is not a charge which falls within the terms of the Order of 1934 and cannot be justified by reference to that Order. If that is right, it follows that no bill—and Mr. Hunter-Brown was disposed to agree—has, in fact, ever been delivered at all. Subject to the question of discretion, therefore, to which I will refer in a moment, it is plain that the right of the clients under the Act is now to call for an itemized bill.

Having reached that conclusion, it is unnecessary to express an opinion (and, as I indicated, I do not intend to do so) on the general and not unimportant matter which was, in fact, decided in favour of the respondent solicitors by the judge in the court below, namely, whether the inclusion of this item in this account was the delivery of a charge. As I do not propose to express an opinion, it is obviously undesirable that I should say anything more about it than this, that having heard Mr. Cozens-Hardy Horne's argument and not Mr. Hunter-Brown's argument, I am not, at the moment, satisfied that to include an item of this general nature in an account of this character is to deliver a charge within the meaning of the Order of 1934, though I am not to be taken to be deciding that it is not, or to be saying that the judge was wrong. I say nothing more about it, neither affirming nor disaffirming the judge's opinion on the matter.

There remains, therefore, only this further point. The court has a discretion whether it will, in a given set of circumstances, order the delivery of a bill. Mr. Hunter-Brown relied on *In re a Solicitor, In re Taxation of Costs,*[1] which came before Roxburgh J. in 1947, as indicating that where there has been a lapse of time such as passed here, it would not be right for the court to order delivery of a bill on the application of a client who, during the period which has elapsed, did not take the trouble to avail himself of his statutory right and did not, until he received inspiration from another case, make any complaint whatever about the bill which he had, in fact, paid. The matter, being one of discretion, must obviously be decided by the court, according to the facts of the particular case before it. I say no more about the case which came before Roxburgh J. than that the length of time which had passed, the circumstances relating to the actual charge said to have been delivered, and the communications which passed during a six-years interval, were all of a nature which made that case wholly different in its general aspect from the present case. All that can be said against the applicants here is that they did not, in fact, challenge the bill in 1949, although Mr. East raised a query about it. The applicants also did during three years continue to treat the respondent solicitors with confidence and, indeed, to instruct them in certain other matters; but beyond that, I do not think that it could be said that they have, by their conduct, deprived themselves of the right, which otherwise they would possess, to have a proper bill. At any rate, exercising my discretion to the best of my ability in this case, I think that it would be right to make the order for the delivery of an itemized bill of costs for which the applicants have asked. I therefore have come to the conclusion that, on the narrow point with which I have tried to deal and which, as I have said, was not debated before the judge or taken into consideration by him, this appeal should be allowed and an order made for delivery of an itemized bill in the ordinary way.

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[1] [1947] Ch. 274; 63 T.L.R. 249; [1947] 1 All E.R. 369.

C. A.

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A SOLICITOR, *In re.* *In re* A TAXATION OF COSTS.

BIRKETT L.J. I agree with the judgment of the Master of the Rolls and, speaking for myself, that judgment covers all the matters which I think it is material to discuss in coming to a decision on the point argued before us. In those circumstances, to add anything would, I think, savour of useless repetition. I am content, therefore, to say that I am entirely of the same opinion.

ROMER L.J. I also agree. Vaisey J. dealt with this summons in chambers and the point on which we are deciding this appeal was not considered or decided by him. The point is an extremely narrow one, and I entirely agree with what the Master of the Rolls has said upon it. I accordingly agree with the order proposed.

Appeal allowed.

Solicitors: *Pennington & Son for Church, Bruce & Co., Gravesend; Henry Boustred & Sons.*

B. A. B.

C. A.

1953
May 5.

Evershed M.R. Denning and Romer L.JJ.

In re CAMPBELL COVERINGS LD.

[No. 00108 of 1953.]

Company—Voluntary liquidation—Report by liquidator—Investigation by official receiver—Application for further order for public examination of director—Powers available to receiver—Persons to apply—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 236 (1), (2), 270, 307, 334 (3).

An order was made under section 334 (3) of the Companies Act, 1948, that all such powers of investigating the affairs of a company in voluntary liquidation as were provided by the Act in the case of a winding up by the court should be conferred on an official receiver appointed by the Board of Trade. He applied ex parte to the court under section 334 (3) for an order that one of the former directors of the company should be directed to attend the court for a public examination. The application was refused on the ground that the applicant had not submitted to the court the reports which would have been required by section 236 of the Act before such an order could be made in the case of a company being wound up by the court. The applicant then applied ex parte to the Court of Appeal under Ord. 58, r. 10:—

Held, (1) that the submission of a preliminary and further report pursuant to section 236 of the Companies Act, 1948, ought not to be regarded as a condition precedent to an order under section 334 (3); but (2) that the powers which the court could confer under section 334 would not enable the receiver to conduct a public examination, nor could the court under that section, on the application of the official receiver of the Board of Trade, set in motion the procedure for either a public or a private examination; and that on that ground the application must be refused.

Semble, an application could be made by the liquidator, a contributory or a creditor under section 307 (1).

Decision of Roxburgh J. affirmed, but on a different ground.

MOTION.

Campbell Coverings Ld. was incorporated on December 31, 1945. On June 1, 1950, the company passed a special resolution that it be wound up. On July 23, 1952, the liquidator, in the course of the voluntary winding up, made a report to the Director of Public Prosecutions in accordance with section 334 (2) [1] of

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[1] Companies Act, 1948, s. 236: "(1) In a case where a winding-up "order is made, the official receiver "shall, as soon as practicable after "receipt of the statement to be submitted under the last foregoing "section, or, in a case where the court "orders that no statement shall be "submitted, as soon as practicable "after the date of the order, submit "a preliminary report to the court ". . . (2) The official receiver may "also, if he thinks fit, make a further "report, or further reports, stating "the manner in which the company "was formed and whether in his "opinion any fraud has been committed by any person in its promotion or formation or by any "officer of the company in relation "to the company since the formation "thereof, and any other matters "which in his opinion it is desirable "to bring to the notice of the court. "(3) If the official receiver states in "any such further report as aforesaid that in his opinion a fraud "has been committed as aforesaid, "the court shall have the further "powers provided in section 270 of "this Act."

S. 270: "(1) Where an order has "been made in England for winding "up a company by the court, and the "official receiver has made a further "report under this Act stating that "in his opinion a fraud has been "committed by any person . . . or "by any officer of the company . . . "the court may, after consideration "of the report, direct that that person "or officer shall attend before the "court on a day appointed by the "court for that purpose and be publicly examined. . . . (2) The official "receiver shall take part in the "examination, and for that purpose "may, if specially authorized by the "Board of Trade in that behalf, "employ a solicitor with or without "counsel."

S. 334: "(2) If it appears to the "liquidator in the course of a voluntary winding up that any past or "present officer, or any member, of "the company has been guilty of any "offence in relation to the company "for which he is criminally liable, "he shall forthwith report the matter, "in the case of a winding up in "England, to the Director of Public "Prosecutions . . . and shall furnish "to the Director . . . such information "and give to him such access to and "facilities for inspecting and taking "copies of any documents, being in-the Companies Act, 1948, alleging malpractices in relation to the company's affairs. On that report, an order was made on February 5, 1953, that: "Pursuant to section 334 (3) of the above-"mentioned Act all such powers of investigating the affairs of the "said company as are provided by the said Act in the case of a "winding up by the court be conferred upon George Frederick "Morris of Board of Trade, Companies (Winding-up) Department, "Inveresk House, Aldwych, in the County of London, an assistant "official receiver attached to the High Court of Justice . . . that "the applicant or the liquidator or any creditor or contributory of "the said company be at liberty to apply to the court in these "proceedings to determine any matter arising in the voluntary "winding up of the said company as there may be occasion."

On March 18, 1953, G. F. Morris reported to the court that a public examination of one of the former directors of the company was desirable, setting out the grounds for his opinion, and on the next day he applied ex parte to Roxburgh J., sitting in chambers, for an order. Roxburgh J. (giving judgment in open court) refused the application on the ground that it was a condition precedent to the jurisdiction of the court to order a public examination, that the official receiver should have submitted to the court a preliminary report, and a further report as required by subsections (1) and (2) of section 236 respectively. The applicant applied ex parte under Ord. 58, r. 10, to the Court of Appeal.

Denys Buckley for the official receiver, the applicant. Section 334 (3) gives to the investigator appointed by the Board of Trade all the powers of inquiry into the affairs of a company in voluntary liquidation which the official receiver would have had if the winding up had been compulsory. These powers of investigation, springing out of the voluntary liquidation, are available without the necessary incidents attaching to a compulsory winding up; in particular the provision of a preliminary report and a further

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"formation or documents in the possession or under the control of the "liquidator and relating to the matter "in question" as he may require. "(3) Where any report is made under "the last foregoing subsection to the "Director of Public Prosecutions . . . "he may, if he thinks fit, refer the "matter to the Board of Trade for "further enquiry, and the Board shall "thereupon investigate the matter "and may if they think it expedient, "apply to the court for an order conferring on the Board or any person "designated by the Board for the purpose with respect to the company "concerned all such powers of investigating the affairs of the company as "are provided by this Act in the case "of a winding up by the court."

report, as required by section 236 in the case of a compulsory winding up, is not a condition precedent to making an order under section 334 for the public examination of an officer of the company in voluntary liquidation as provided by section 270. Any other interpretation would make nonsense of section 334 (3), for the reports referred to in section 236 could not come into existence in the case of a company in voluntary liquidation, since, as Roxburgh J. said, the powers of investigation conferred by section 334 do not extend to the power to ask for a statement of affairs and there cannot be a preliminary report until such a statement has been delivered. Roxburgh J. said that the "further" report envisaged by section 236 was dependent on the preliminary report and that there could not be a "further" report unless there had first been a preliminary report; and as the existence of a further report was, he said, a condition precedent to making an order for public examination it would follow that such an order could not be made if the company whose affairs were being investigated was in voluntary liquidation. It is submitted, however, that even in the case of a company in compulsory liquidation the two reports are not interrelated. "Further" in section 236 (2) is used merely to distinguish this report from the common form preliminary report. The report envisaged is not of a character dependent on the pre-existence of a preliminary report, in the sense of "further "and better particulars"; nor is it dependent procedurally on an earlier preliminary report. Nor is a preliminary report "pre-"liminary to a further report." It is only preliminary in the sense that it provides the court with preliminary or basic information. Both reports can be simultaneous and "further" merely means "another." In a compulsory winding up, before the court can make an order for the public examination of an officer of the company, there must be before the court the information normally contained in a preliminary report by the official receiver together with a further report alleging fraud. [Counsel referred to *In re Great Kruger Gold Mining Co. Ld.*[2]] But in the case of a company in voluntary liquidation these preliminaries can be modified, and, provided the court has been provided by the official receiver with sufficient material on which to base an order for public examination, it does not matter if the procedural steps necessary in a compulsory winding up, and which could only be taken in a compulsory winding up, have not been taken. The note on p. 568 of Buckley on the Companies Acts, 12th ed., is misleading. In the present case the liquidator reported to the Board of Trade, and after the matter had been carefully considered the official receiver made a report which gives information equivalent to that provided in the "further" report which he would have to produce in a compulsory winding up; that report is a sufficient base for an order under section 334 (3).

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[2] [1892] 3 Ch. 307; 8 T.L.R. 688.

[ROMER L.J. But the power of public examination is not a power conferred on any person; the public examination is conducted by the court.]

The official receiver is not seeking to direct anyone to attend for public examination; he merely reports that he considers that a certain person should be publicly examined and that he wishes to have an opportunity to examine him and to extract information. Section 334 (3) is not perhaps expressed as clearly as it might be, but it means that the person appointed to investigate can put into operation the machinery of investigation which would be put into operation by virtue of sections 268 and 270 in the case of a company in compulsory winding up. The person appointed to investigate has no powers except those conferred by section 334 (3), however inaptly worded, and the investigation would be stultified if an officer of the company could not be publicly examined. The power to ask the court to put the machinery of section 270 into operation is a power of investigation within section 334 (3) which can, it is submitted, be invoked when the initial power is ineffective. It is a power which can only be put into operation by order of, and at the discretion of, the court, but, once it is in operation, it is investigation by the applicant.

[EVERSHED M.R. The application should be made under section 307.]

Under section 307 the applicant would have to be the liquidator or one of the other persons there mentioned; the application is properly brought under section 334. The applicant asks for a special power of investigation by means of a public examination of the director; he asks for a further order enabling him to that effect—an order which is further to the general order conferring powers of investigation which has already been made.

[ROMER L.J. But section 334 (3) does not empower the court to confer powers of the court on the official receiver and the power to examine publicly is a power of the court. The official receiver is under an obligation to examine; it is not a power which can be conferred on him.]

The court may confer on the official receiver power to investigate and that includes power to investigate by means of a public examination. He has the power, after making a report showing a prima facie case of fraud, to ask the court to order that the person who is alleged to have committed the fraud should attend for public examination. In making a report charging an individual with fraud, he is exercising one of the functions conferred on him by the Act and it is a step towards a further investigation which is conducted by him but which he could not carry out without a further order by the court. The investigation is one continuous process but the further stage is dependent on a sufficient case on report being made out.

EVERSHED M.R. This application comes before the court under Ord. 58, r. 10, which states that "where an *ex parte* "application has been refused by the court below, an application "for a similar purpose may be made to the Court of Appeal "*ex parte*," within the time therein stated. The matter concerns a company known as Campbell Coverings Ld., which is now in voluntary liquidation, the winding-up resolution having been passed in June, 1950. The affairs of the company have caused some concern to those involved in the liquidation, for in July, 1952, the liquidator made a report to the Director of Public Prosecutions in accordance with section 334 (2) of the Companies Act, 1948. [His Lordship read the subsection and continued:] Following that report, an order was made on February 5, 1953, on the application of the Board of Trade under section 334 (3).

[His Lordship read the substantive part of the order as set out above and continued:] That form of order followed in its language subsection (3) of section 334. [His Lordship read the subsection and continued:] The matter which has given rise to the order and to the present application is that, according to the investigations so far made, it is said that one of the former directors of the company has been guilty of malpractices in relation to the company's affairs, and it is now desired that that individual should be directed to attend the court for a public examination. Although, therefore, as I have indicated, the order made on February 5, 1953, in terms followed the language of subsection (3) of section 334, Mr. Buckley, for the assistant official receiver, seeks now a further order under the same subsection to the effect that the individual to whom I have referred should be required to attend for a public examination. The form of the application for that purpose is not entirely apposite, for it asks for an order that the report which the assistant official receiver made to the court pursuant to section 236 (2) of the Act and dated March 18, 1953, "be considered and such order made thereon as the court may "deem just." In fact Mr. Morris has made no report pursuant to section 236 (2). Indeed, the main point of the argument which Mr. Buckley presented to the court was that a report under that subsection was not required nor could it be made in the present case.

Roxburgh J. said, however, that it was a condition precedent to the jurisdiction of the court to make any order directing a public examination of an officer or ex-officer of a company, although made in a voluntary winding up, that there should be in existence what is called a "further" report in section 236, that "further" report in turn requiring the existence of a preliminary report under the same section. Mr. Buckley's main submission has been that so to hold makes nonsense of subsection (3) of section 334; for in a voluntary winding up neither the preliminary report nor any further report, such as is mentioned in section 236, could have come into existence.

With all respect to Roxburgh J., I agree with Mr. Buckley that the requirement of a further report, as specified in section 236, ought not to be regarded as a condition precedent to an order under section 334. In section 334 the legislature is saying that certain powers may be exercised in a voluntary winding up, being powers which in a compulsory winding up would be exercisable only if certain things, which could only be done in a compulsory winding up, had been done.

Section 235 deals with a winding up by the court and provides that a statement of the company's affairs in such an event is to be submitted to the official receiver. Subsection (1) provides that, unless the court dispenses therewith, there is to be made out a statement as to the affairs of the company, verified by affidavit and showing particulars of the company's assets, debts, liabilities, and so forth, and also giving such further or other information as may be prescribed or as the official receiver may require. After providing who shall verify the statement and the time within which it must be submitted, subsection (4) states: "Any person "making or concurring in making the statement and affidavit "required by this section shall be allowed . . . out of the assets "of the company" his costs and expenses incurred. Subsection (5) provides that if any person, without reasonable excuse, makes default in complying with the requirements of the section, he is liable to a fine, and subsection (6) says that a person stating himself in writing to be a creditor or contributory shall be entitled as therein provided to inspect the statement. Subsection (7) provides: " Any person untruthfully so stating himself to be a " creditor or contributory shall be guilty of a contempt of court " and shall, on the application of the liquidator or of the official " receiver, be punishable accordingly." It will be seen, therefore, that all these powers for obtaining information which rest upon the official receiver depend upon there being a winding up by the court.

Section 236 provides that where there has been such a statement (and similarly in cases where the statement has been dispensed with), the official receiver must make a preliminary report to the court in which he must state, among other things, whether he thinks further inquiry is desirable with regard to the promotion, formation, and so forth of the company. [His Lordship read subsection (2) of section 236 and continued:] In that event, that is to say, when a further report is made, the court shall have the further powers provided (inter alia) by section 270 of the Act, which is the section empowering the court to order public examination. Section 245 gives a liquidator in a compulsory winding up certain administrative powers. Section 266 empowers the court to order production of books for inspection by creditors or contributories, and section 268 makes provision for the private examination of any person suspected of having in his possession any property of the company, and so forth. In a private examination persons required to be examined may object to answer questions on the ground that they may, thereby, be incriminated, and the answers which they may give are not available for use in a criminal proceeding.

Section 270 was foreshadowed in section 236. [His Lordship read subsection (1) and continued:] Subsection (2) states that the official receiver shall take part in the examination, and subsection (3) entitles the liquidator (where the official receiver is not a liquidator) and any creditor or contributory, to take part in the public examination. It has been decided by this court (for example, in *In re Great Kruger Gold Mining Co. Ld.*[1]), that in a compulsory winding up, in accordance with the section which was then in force [section 8 of the Companies (Winding-up) Act, 1890], which for present purposes may be taken as being in the same terms as section 270 (1) of the Act of 1948, there must before the court can order a public examination have been what is called a further report and that that report must have been considered.

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[1] [1892] 3 Ch. 307; 8 T.L.R. 688.

Roxburgh J. said that the power of the court to order a public examination must always be regarded as being limited by the condition that there must be a further report before the court which the court has had to consider. He thought also that emphasis ought to be put on the word " further," which involved the conception that there must also have been, first, a preliminary report. As I have already indicated, it seems to me that if Parliament states that powers vested in the court in a compulsory winding up shall be available on application in a voluntary winding up, it cannot have been supposed that steps would have been taken in a voluntary winding up which would only arise, and which could only have been taken, in a compulsory winding up. In other words, if the matter rested on this point alone, I should not, with all respect to Roxburgh J., regard the language of the relevant section, even in the light of *In re Great Kruger Gold Mining Co. Ld.*,[1] as involving the result that in some way there must be imported into section 334 provisions which are only applicable to a compulsory winding up before effect can be given to the section.

But during the course of the argument another point was put by Lord Justice Romer which seems to me to be fatal to Mr. Buckley's application under this subsection for an order for public examination. The order required by Mr. Buckley on behalf of the official receiver is a direction by the court that the individual in question shall attend before the court on a day appointed by the court for the purpose of being publicly examined. The question is whether an order of that kind is contemplated by the language of subsection (3) of section 334. I am compelled to conclude that the language does not contemplate such an order. It is evident from subsection (3) that the Board may apply to the court, not for an order that a person is to attend the court for examination, but for an order conferring on the Board or some person designated by the Board " all such " powers of investigating the affairs of the company as are " provided by this Act in the case of a winding up by the court." It seems to me impossible that under that subsection the court could invest the official receiver with the power on his own motion

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[1] [1892] 3 Ch. 307; 8 T.L.R. 688.

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to conduct a public examination of the person whose conduct had been impugned. It appeared at first sight that, unless by some stretch of the language some such construction was given to the subsection, no other effect was possible. But I think that the answer to that suggestion is found in section 235. In other words, it seems to me that subsection (3) of section 334 is apt to give the official receiver powers to compel persons (and to impose penalties if they do not obey) to supply information—those being the powers which the official receiver would have had by virtue of section 235 in a compulsory winding up. But I have been unable to construe subsection (3) of section 334 as enabling the court, on the application of the Board of Trade, to set in motion the procedure for either a private or a public examination. I do not, of course, know whether subsection (3) was intended to have that effect, but judging, as I must, only by the language used, it seems to me necessarily to provide a negative answer to the question put to the court.

But I do not think that that conclusion is, from the point of view of those concerned in this liquidation, a counsel entirely of despair. Section 307 (1) provides: "The liquidator or any contributory or creditor may apply to the court . . . to exercise, "as respects the enforcing of calls or any other matter, all or any "of the powers which the court might exercise if the company "were being wound up by the court." An application under that section must be made by the liquidator or a contributory or a creditor, and the present applicant is the official receiver. If, therefore, it is thought appropriate to set in motion the powers of that section, another applicant will have to be found to make the application. Since that application is not at present before the court it would not be right for me to express a final view on any problems which might arise if it were before the court. But the view which I have taken, with all respect to Roxburgh J. on the question whether there must be a "further" report in a voluntary winding up, no less than in a compulsory winding up, applies where there is an application under section 307, no less than where application is made under section 334. I cannot suppose that when Parliament says that the court may, on application, exercise any of the powers in a voluntary winding up which it may exercise in a compulsory winding up, it was saying at the same time that if the powers in a compulsory winding up require the existence of conditions which could be only satisfied in a compulsory winding up, then those powers could not in any event be available in a voluntary winding up. Such a conclusion

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seems to be in conflict with the express purpose and sense of section 307 (1).

I am aware that I am expressing a view which is not in accordance with the note of the editors of Buckley on the Companies Acts (12th ed., p. 568), and I am, therefore, diffident in expressing a final conclusion on this matter. But, as at present advised, my view is as I have stated. It does not, however, follow that the court would necessarily exercise this particular power unless there was before the court material which was, in substance at any rate, equivalent to the material which the court would require to have in a compulsory winding up. Indeed, the contrary seems to me the right view, and I think that before the court would exercise its discretionary power it would require information similar to that which it would have required if the application had been made in the course of a compulsory winding up. But for reasons which I have already indicated, I say no more about what might happen if an application was made under section 307. It is possible that other points may arise which have not been discussed before us today.

On the present application the point which I have mentioned is fatal. The form of the order of February 5, 1953, and the form of the present application itself, both indicate the fallacy in the proposition that under section 334 (3) the court can make an order directing a particular individual to attend the court on a day and time stated for the purpose of there being publicly examined. For these reasons it seems to me that the application must be refused.

DENNING L.J. I agree, and I would only say that I am glad that the Master of the Rolls, as at present advised, thinks that section 307 may suit the purpose. I should be sorry to think that in a voluntary liquidation, after the inquiries which have been made into this matter, the court could not order a public examination of the individual concerned. It seems to me that if on the application of the liquidator the court can make such an order, it would be most satisfactory. I agree with what my Lord has said.

ROMER L.J. I agree so fully with what the Master of the Rolls has said that I cannot usefully add anything of my own.

Application refused.

Solicitor: *Solicitor to the Board of Trade.*

E. D.

INLAND REVENUE COMMISSIONERS *v.* UNIVERSAL GRINDING WHEEL CO. LD.

1953
May 7.

Upjohn J.

Revenue—Profits tax—Company—Preference shares redeemed at a premium—Premium not a "distribution" for purposes of profits tax—Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 36.

Section 36 (1) of the Finance Act, 1947, defines the meaning of a "distribution" for the purpose of profits tax, and the proviso to that section states: "Provided that no sum applied in . . . "reducing the share capital of the person carrying on the trade "or business shall be treated as a distribution."

The £1 preference shares of a company were by the company's articles of association redeemable at 27s. The shares were in 1947 redeemed at 27s. per share; the 7s. being paid out of profits as required by the articles and section 46 of the Companies Act, 1929. The company was assessed to profits tax on the 7s. premium, on the footing that it was a "distribution" for the purpose of that tax within the meaning of section 36.

The company contended that the 7s. was used in the reduction of the share capital of the company, and therefore excluded by the proviso to section 36 from being treated as a distribution:—

Held, that a company could reduce its capital by redeeming its preference shares if so authorized by its articles, and that this company was bound by its articles to apply 27s. for every £1 of nominal capital reduced; the premium of 7s. was therefore used in the reduction of the company's capital within the meaning of the proviso to section 36, and it was not a "distribution" for the purpose of profits tax.

CASE STATED.

The Crown appealed from a decision of the Commissioners for the Special Purposes of the Income Tax Acts, who had discharged an assessment to profits tax on the respondent company in respect of 7s. premium paid on each £1 preference share redeemed by the company.

The respondent company, the Universal Grinding Wheel Co. Ld., was incorporated on March 8, 1935, with a nominal capital of £600,000 divided into 400,000 5 per cent. cumulative participating preference shares of £1 each and 400,000 ordinary shares of 10s. each.

By article 8 (D) of the articles of association provision was made in accordance with powers given by section 46 of the Companies Act, 1929, for the redemption of the preference shares at the price of the nominal amount of the share plus a premium of 7s. per share, together with certain other sums relating to

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any deficiency of dividend not here relevant. In 1947 the company redeemed those preference shares, the redemption being carried out in part by an issue of new capital and in part out of profits available for dividend. In particular, the premium of 7s. was paid out of such profits, as required by section 46 of the Companies Act and by the company's articles of association.

The question for determination on the case stated was whether, for the purposes of section 36 of the Finance Act, 1947,[1] the

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[1] Finance Act, 1947, s. 30 (1): "Subject to the provisions of this "Part of this Act—(*a*) the profits tax "to be charged for any chargeable "accounting period on the profits of "a trade or business shall be of an "amount equal to twelve and a half "per cent. of the profits. . . ."

Subs. (2): "Subject to the provisions of this Part of this Act, if, "in the case of any trade or business, "the net relevant distributions to "proprietors (as defined in the subsequent provisions of this Part of this "Act) for any chargeable accounting "period are less than the profits "thereof for that period chargeable to "the profits tax, the amount chargeable by way of the profits tax in "respect of that period shall be "reduced by an amount equal to "seven and a half per cent. of the "difference."

S. 34 defines "the net relevant distributions" to proprietors.

Subs. (2): "The net relevant distributions to proprietors for any "chargeable accounting period of a "body corporate, society or other body "are so much of the gross relevant "distributions to the proprietors for "that period of that body corporate, "society or other body (as defined by "the next succeeding section) as bears "to the whole of the said gross relevant distributions the same proportion that the profits for that period "bear to the profits therefor computed "without abatement and including "franked investment income."

S. 35 (1): "Subject to the provisions of this and the two next succeeding sections, the gross relevant "distributions to proprietors for any "chargeable accounting period of a "body corporate, society or other "body, are the total distributions to "the members of the body corporate, "society or other body, not being distributions allowable as deductions in "computing the profits of the trade or "business for any period for the purposes of the profits tax, and being "either— . . . (*c*) in the case of the "last chargeable accounting period "in which the trade or business is "carried on, so much of any distribution made after the end of that "period (not being a distribution to "which paragraph (*a*) of this subsection applies) as is not a distribution "of capital, and, for the purposes of "paragraph (*c*) of this subsection, the "distributions which are to be treated "as distributions of capital shall not, "in the case of distributions made "by a body corporate with a share "capital, exceed an amount equal to "the total nominal amount of the "paid-up share capital thereof together, where the body corporate has "issued shares at a premium for cash, "with the aggregate of the amounts "of the premiums."

S. 36 (1): "Subject to the provisions of the next succeeding subsection, wherever—(*a*) any amount "is distributed directly or indirectly "by way of dividend or cash bonus "to any person; or (*b*) assets are distributed in kind to any person; or "(*c*) where the trade or business is "carried on by a body corporate the "directors whereof have a controlling interest therein, an amount is "applied, whether by way of remuneration, loans or otherwise, for the "benefit of any person, there shall be "deemed for the purposes of the last "preceding section to be a distribution "to that person of that amount or, "as the case may be, of an amount company had applied, as the Crown contended, 20s., or, as the company contended, 27s., in reducing each £1 nominal share of its preference capital.

Montgomery White Q.C., *J. H. Stamp* and *Sir Reginald Hills* for the Crown. The proviso to section 36 of the Finance Act, 1947, has no application to the premium of 7s.; the operation of the proviso does not relate to the redemption of shares; it is confined to reduction of capital. Only 20s. per share was, and could be, applied in the reduction of capital, since no sum could be applied in the reduction of capital greater than the amount by which the capital was reduced in the company's books.

The transaction of 1947, on its true construction, meant that 20s. was paid by way of reduction of capital, as represented by the preference shares, and 7s. as a premium which would be represented in the company's books as a reduction on the profit and loss account. By section 46 of the Companies Act, 1929, such a premium had to be paid out of profits, and it is the scheme of the Finance Act, 1947, that no relief should be allowed on a distribution of profits, and that only the return of actual capital attracts the relief under the proviso. [He referred to section 35 of the Finance Act, 1947.]

Frederick Grant Q.C. and *Gordon Richardson* for the respondent company. A taxing statute must be construed strictly, and the court must disregard any policy or scheme believed to be the object of the statute.

The redemption of the preference shares was a reduction of the share capital of the company, and the amount applied in redeeming those shares was 27s. per share. That amount was "applied . . . in reducing the share capital" within the meaning of the proviso.

There is a difference between the terms of the proviso to section 36 (1) and those of section 35 (1), where the amount treated as a distribution of the company's capital in a liquidation is "the total nominal amount of the paid-up share capital" together with the amount of any premiums.

Section 46 (1) (*c*) of the Companies Act, 1929—which gives power to issue redeemable preference shares—uses the expression "amount applied in redeeming the shares." The amendment of

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"equal to the value of those assets: "Provided that no sum applied in repaying a loan or in reducing the "share capital of the person carrying "on the trade or business shall be "treated as a distribution."

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those provisions by section 71 (1) of the Companies Act, 1947, makes a distinction between "a sum equal to the nominal amount "of the shares redeemed" and "the amount applied in redeeming "shares."

The redemption of the preference shares at 27s. per share was a purchase by the company of its own shares at a price of 27s. a share in a manner permitted by the Companies Act: see *Trevor* v. *Whitworth*[2] and *British and American Trustee and Finance Corporation Ld.* v. *Couper.*[3] A company is entitled to apply more than 20s. of assets in redeeming a 20s. share: see *Ex parte Westburn Sugar Refineries Ld.*[4] [He also referred to *In re Serpell & Co. Ld.*[5]]

Montgomery White Q.C. replied.

Upjohn J., having stated the facts and the relevant sections of the Finance Act, 1947, continued:—It is admitted that prima facie the distribution of 27s. a share is a distribution for the purpose of the Finance Act, 1947, but it is said that the proviso to section 36 (1) of the Act takes it out of the definition contained in that section. That proviso is in these terms: "Provided "that no sum applied in repaying a loan or in reducing the share "capital of the person carrying on the trade or business shall be "treated as a distribution."

The sum of 20s. per share was admittedly applied in reducing capital, and the whole question is whether, having regard to the proviso, the extra sum of 7s. is to be treated as a distribution or not. The argument of the Crown was this: that the section did not refer to the amount applied in redeeming shares but in reducing capital. A sum could not be applied in reducing capital greater than the nominal amount by which the capital was reduced in the balance sheet. It was said that the true effect of what took place in 1947 was this: that 20s. per share was applied in reduction of capital and 7s. per share in payment of a premium to the preference shareholders. The Crown pointed out that the premium was necessarily paid out of profits, having regard to section 46 of the Companies Act, 1929, and the articles of association, and the whole scheme of the Finance Act, 1947, is that the distribution of any profits forfeits any non-distribution relief. They point in this respect to section 35 which precludes any distribution in a liquidation representing accumulated profits being treated as capital beyond the amount of the nominal capital. They submit that, when the matter is analysed accurately the company's balance sheet will show that 20s. goes to reduce £1 of preference capital and 7s. goes to reduce the profit and loss account.

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[2] (1887) 12 App.Cas. 409; 3 T.L.R. 745.

[3] [1894] A.C. 399; 10 T.L.R. 415.

[4] [1951] A.C. 625; [1951] 1 T.L.R. 728; [1951] 1 All E.R. 881.

[5] [1944] Ch. 233; 60 T.L.R. 309.

On the other hand, the company contended that the section had to be strictly construed and, in taxing the subject, it was not right to rely on any supposed general scheme or policy of the Act in taxing the profits of the company. I agree with that contention.

The company then said that 27s. had, in fact, been applied in reducing the capital and the question was posed how else had the 7s. been applied? The company submitted first that the redemption of shares was a purchase of shares by the company; secondly, that a company which purchased its own shares thereby reduced its capital. They relied on certain well-known passages in *Trevor* v. *Whitworth*,[1] and in *British and American Trustee and Finance Corporation Ld.* v. *Couper*,[2] in support of those propositions, which cannot indeed be disputed. It was said, therefore, that the company had had to apply 27s. in the purchase of its shares and had thereby reduced its capital. Counsel for the company pointed to the fact that the articles speak of a redemption price. It was also pointed out that there was nothing to preclude a company applying assets to a greater value than £1 in paying off a £1 share: *Ex parte Westburn Sugar Refineries Ld.*[3]

There is no dispute (although it does not determine the matter) that the effect of a redemption of preference shares pursuant to section 46 of the Companies Act, 1929, effects a reduction in the nominal amount as well as in the paid-up capital of the company; that was determined by Uthwatt J. in *In re Serpell & Co. Ld.*[4]

Briefly, those are the respective contentions before me. The Special Commissioners decided in favour of the company. They said this: "In our opinion, the redemption of the 400,000 "preference shares was simply a way of reducing the share "capital of the company. In order to reduce the share capital "in that way, the company has to apply, and did apply, 27s. in "payment for each share. We held that the full amount

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[1] 12 App.Cas. 409.

[2] [1894] A.C. 399.

[3] [1951] A.C. 625.

[4] [1944] Ch. 233.

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"representing 27s. per share was, therefore, applied in reducing "the share capital of the company within the meaning of the "proviso to section 36 (1) of the Act."

I have found this a most difficult case, and my mind has fluctuated several times during the course of the argument. I disregard any supposed scheme of taxation in the Act and pose the question, what sum has been applied in reducing the share capital of the company? Ought one, as the Crown says, to explore the application of this sum of 27s. per share into the company's balance sheet, and find that 20s. goes to reduce the capital and 7s. to reduce the profit and loss account? Or ought one to treat the transaction as one and take the view that, in order to get rid of these shares and thereby reduce the capital by that amount, the company were compelled by their articles to apply 27s. per share in reducing their capital?

A company may reduce its capital in many ways, and one way is by redeeming its preference shares if so authorized by its articles. To reduce the capital by that method the company was bound by its articles to apply 27s. for every £1 nominal of capital reduced.

On the whole, although not without some hesitation, I think that the Special Commissioners were right, and I dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Linklaters & Paines; Solicitor of Inland Revenue.*

I. G. R. M.

C. A.

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Mar. 24, 25, 26;
May 18.

Evershed M.R., Jenkins and Hodson L.JJ.

BADDELEY AND OTHERS (TRUSTEES OF THE NEWTOWN TRUST) *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Stamp duty—Charity—Conveyances of property to trustees on trusts for "the promotion of the religious social and physical "well-being of persons resident in" named localities who "are "members or likely to become members of the Methodist Church" Valid charitable trust created—"Members of the Methodist Church" a section of the community—Conveyances to be assessed to ad valorem stamp duty at reduced rate—43 Eliz. I, c. 4—Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *ss.* 52 (1), (2); 54 (1).

By the first of two conveyances of even date, land on which were a mission church, lecture room and store was transferred to trustees;

and by the second four other pieces of land laid out as playing fields were transferred to them, and it was directed that a specified sum be held as though it were capital money arising from the sale of those pieces of land. The first conveyance provided: "The trustees "shall permit the said property to be appropriated and used by the "leaders for the time being of the Stratford Newtown Methodist "Mission for the promotion of the religious social and physical "well-being of persons resident in the County Boroughs of West "Ham and Leyton in the County of Essex by the provision of "facilities for religious services and instruction and for the social "and physical training and recreation of such aforementioned "persons who for the time being are in the opinion of such leaders "members or likely to become members of the Methodist Church "and of insufficient means otherwise to enjoy the advantages "provided by these presents and by the provision of facilities "for religious social and physical training and recreation and by "promoting and encouraging all forms of such activities as are "calculated to contribute to the health and well-being of such persons. . . ." The second conveyance directed the trustees to permit the property thereby conveyed to be used ". . . for the promotion "of the moral social and physical well-being of persons resident "in the County Boroughs of West Ham and Leyton in the County of "Essex who for the time being are in the opinion of such leaders "members or likely to become members of the Methodist Church "and of insufficient means otherwise to enjoy the advantages provided by these presents by the provision of facilities for moral "social and physical training and recreation and by promoting "and encouraging all forms of such activities as are calculated "to contribute to the health and well-being of such persons. . . ."

The Commissioners held that both deeds fell to be stamped under Sch. I to the Stamp Act, 1891, as either conveyances on sale or voluntary conveyances to be treated as such under section 74 of the Finance (1909–10) Act, 1910; and that they were accordingly liable to ad valorem duty at the rate of £1 for every £50 under section 52 (1) of the Finance Act, 1947. The trustees appealed against the assessments, contending in each case that the stamp duty ought to be at one half that rate, on the ground that the conveyances were made to "a body of persons established for charitable purposes only "or to the trustees of a trust so established" within section 54 (1) of the Finance Act, 1947. Thus, the question was whether the appellants were trustees of a trust established for charitable purposes only.

Harman J. dismissed the appeals of the trustees against the assessments, holding that the trusts declared were not charitable trusts. On appeal:—

Held, first, that on the true construction of the first conveyance the trust created had not three objects, namely, (a) the promotion of religious well-being, (b) the promotion of social well-being, and (c) the promotion of physical well-being, but one object only, namely, the promotion of the religious, social and physical improvement of persons resident in the two county boroughs. Social and physical well-being could not, in the context, connote mere social enjoyment or mere indulgence in sport. The latter part of the trusts was concerned with the means by which the object of the trust could be achieved.

Held, secondly, that on the true construction of the second conveyance the object of the trust was the moral, social and physical improvement of the persons in question. As in the case of the first conveyance, the trust had one object with three aspects.

Held, thirdly, that the trusts created were not for the relief of poverty, nor for the advancement of education nor of religion. They accordingly did not fall within the first three heads of charitable purpose enunciated by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* [1891] A.C. 531, 583. For either trust to qualify as a legal charity, it had to do so under the fourth head, as being a trust for a purpose beneficial to the community.

Held, fourthly, that the fourth head of legal charity, namely, trusts for a purpose beneficial to the community, was not limited to purposes mentioned in, or analogous to some purpose mentioned in, the preamble to the Statute of Elizabeth I exclusive of those which had been eliminated as referable to any of the first three heads. Nor was it necessary for the purposes of the fourth head of charity that the section of the public to be benefited should be the public at large, without any restriction otherwise than by reference to residence in some specified area. A class restricted to such members of the public resident in a specified area as were members of some particular religious sect or denomination constituted, for the purpose of the fourth head, a sufficient section of the public.

Held, fifthly, that given the requisite element of public benefit, the objects of the two trusts were within the spirit and intendment of the preamble to the Statute of Elizabeth I and fell within the fourth head of charitable trusts.

Held, sixthly, that the nexus provided by membership of a particular religious sect or persuasion did not constitute the members for the purposes of the law of charity a mere aggregate of private individuals or prevent them from being a section of the public.

Held, lastly, that the religious qualification in the two trusts did not have the effect of making them void for uncertainty.

Accordingly, the trusts constituted by the two conveyances were valid charitable trusts.

Trustees of Londonderry Presbyterian Church House v. *Inland Revenue Commissioners* [1946] N.Ir. 178; 27 T.C. 431, and *Williams' Trustees* v. *Inland Revenue Commissioners* [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513, considered and distinguished.

Income Tax Commissioners v. *Pemsel* [1891] A.C. 531; 7 T.L.R. 657; *Dunne* v. *Byrne* [1912] A.C. 407; 28 T.L.R. 257; *Farley* v. *Westminster Bank Ld.* [1939] A.C. 430; 55 T.L.R. 943; [1939] 3 All E.R. 491; *Oppenheim* v. *Tobacco Securities Trust Co. Ld.* [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31, and *Inland Revenue Commissioners* v. *City of Glasgow Police Athletic Association* [1953] A.C. 380; [1953] 1 All E.R. 747, considered.

When trusts for the provision of recreation will constitute legal charitable trusts considered.

Decision of Harman J. [1953] 1 W.L.R. 84; [1953] 1 All E.R. 63, reversed.

APPEALS from Harman J.[1]

The question raised by these appeals, which arose under cases stated from decisions of the Inland Revenue Commissioners, under the Stamp Act, 1891, was whether or not two conveyances, both dated August 21, 1951, and made in favour of the appellants, fell to be stamped, as the Commissioners held, under Sch. I to the Act, as either conveyances on sale or voluntary conveyances to be treated as such under section 74 of the Finance (1909–10) Act, 1910, and, accordingly, were liable to ad valorem duty at the rate of £1 for every £50 under section 52 of the Finance Act, 1947. The appellants contended in each case that the stamp duty ought to be at one-half of that rate, on the ground that the conveyances were made to " a body of persons established for " charitable purposes only or to the trustees of a trust so established " within the meaning of section 54 (1) of that Act. In each case, therefore, the question was whether the appellants were trustees of a trust established for charitable purposes only.

The property conveyed was in both cases provided by one Bernard Baddeley (referred to as " the donor ") and conveyed by him, or, in the first case, at his direction by a vendor to him, to himself and the same six other persons as trustees. The conveyance in the first case (hereinafter called " the first " conveyance ") comprised property described in the schedule thereto as a piece of land " situate at Stratford in the County of " Essex and containing six hundred and eighty square yards or " thereabouts . . . together with all those premises including a " mission church, lecture room and store erected on the said piece " of land or on some part thereof," and was referred to in a recital as the property from which " the Stratford Newtown " Methodist Mission is at present conducted."

The trusts declared by the first conveyance (so far as material for the present purpose) were set out in clause 2 in these terms: " The trustees shall hold the property hereby conveyed (herein- " after called ' the said property ') upon the trusts following that " is to say: (*a*) The trustees shall permit the said property to be " appropriated and used by the leaders for the time being of the

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[1] [1953] 1 W.L.R. 84; [1953] 1 All E.R. 63.

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"Stratford Newtown Methodist Mission under the name of 'the "'Newtown Trust' (hereinafter called 'the foundation') for "the promotion of the religious social and physical well-being "of persons resident in the County Boroughs of West Ham and "Leyton in the County of Essex by the provision of facilities for "religious services and instruction and for the social and physical "training and recreation of such aforementioned persons who for "the time being are in the opinion of such leaders members or "likely to become members of the Methodist Church and of "insufficient means otherwise to enjoy the advantages provided "by these presents and by the provision of facilities for religious "social and physical training and recreation and by promoting "and encouraging all forms of such activities as are calculated "to contribute to the health and well-being of such persons "Provided always that the trustees shall not at any time here-"after and so long as the trusts hereby declared shall not have "totally failed use or permit the said property to be used either "for physical training or physical recreation or any kind of game "on Sundays Christmas Days or Good Fridays or for the sale or "consumption of intoxicating drink. (*b*) The trustees may from "time to time:—(i) maintain the said property or any part thereof "as a centre for religious services and instruction and for social "and physical training and recreation; (ii) maintain the buildings "now standing on the said property and erect and maintain such "other buildings and works as they consider appropriate for the "purposes aforesaid; (iii) accept from such leaders such annual "payments as the trustees in their absolute discretion shall con-"sider reasonable for the use of the buildings standing on the "said property Provided always that such annual payments shall "not exceed fifty pounds in any year so long as such leaders shall "pay the cost of heating lighting and cleaning the said premises "and the insurance thereof against loss or damage by fire and "the outgoings in respect thereof."

The conveyance in the second case (hereinafter called "the "second conveyance") comprised properties at Ilford in the County of Essex described in a recital as "the properties described "in the first parts of the first second third and fourth schedules "hereto, which said properties are now laid out as a playing field "and upon parts of which a pavilion and a groundsman's bunga-"low have been erected." The trusts declared by the second conveyance concerning these properties, so far as material for the present purpose, were set out in clause 2 in these terms: "The "trustees shall hold the properties hereby conveyed (hereinafter "called 'the said property') upon the trusts following that is "to say:—(*a*) The trustees shall permit the said property to be "appropriated and used by the leaders for the time being of the "Stratford Newtown Methodist Mission under the name of 'the "'Newtown Trust' (hereinafter called 'the foundation') for "the promotion of the moral social and physical well-being of "persons resident in the County Boroughs of West Ham and "Leyton in the County of Essex who for the time being are in the "opinion of such leaders members or likely to become members "of the Methodist Church and of insufficient means otherwise to "enjoy the advantages provided by these presents by the provision of facilities for moral social and physical training and "recreation and by promoting and encouraging all forms of such "activities as are calculated to contribute to the health and well-"being of such persons Provided always that the trustees shall "not at any time hereafter and so long as the trusts hereby "declared shall not have totally failed use or permit the said "property to be used either for physical training or physical "recreation or any kind of game on Sundays Christmas Days "or Good Fridays or for the sale or consumption of intoxicating "drink. (*b*) The trustees may from time to time:—(i) maintain "the said property or any part thereof as a ground for moral social "and physical training and recreation; (ii) maintain the buildings "now standing on the said property and erect and maintain such "other buildings and works as they consider appropriate for the "purposes aforesaid; (iii) maintain a house for the accommodation of the groundsman and his family upon the said property "or purchase or take on lease any adjoining or neighbouring land "houses or buildings for that purpose."

By clause 3 of the second conveyance, trusts were declared of a sum of £10,000 paid to the trustees by the donor, clause 3 (so far as material for the present purpose) being in these terms: "The trustees shall hold the said sum of ten thousand pounds "this day paid to them by the donor (the receipt of which sum "the trustees hereby acknowledge) and all donations subscriptions "legacies and other moneys which may at any time hereafter be "paid to them for that purpose and all real and personal property "which may at any time hereafter be conveyed transferred "devised or bequeathed to them for that purpose upon trust to "use and apply the same for the general purposes of the foundation as if the same were capital money arising under the Settled "Land Act 1925 from land settled by this deed in such manner "as the trustees shall think most beneficial for promoting the "objects of the charity hereby constituted."

Harman J. dismissed both the appeals of the trustees from the decisions of the Commissioners, holding that the trusts contained in the two conveyances did not constitute valid charitable trusts.

The trustees appealed.

S. Pascoe Hayward Q.C. and *W. F. Waite* for the trustees. The question is whether the two conveyances of August 21, 1951, fall to be stamped as being conveyances to "a body of persons "established for charitable purposes only or to the trustees of a "trust so established," so that, in accordance with the provisions of section 54 (1) of the Finance Act, 1947, they require to be stamped at the lower rate only. Harman J. rightly held that the Methodists, for whose benefit these trusts were created, constituted a section of the public and, accordingly, that the necessary element of public benefit existed, if the purposes of the trusts were otherwise charitable; but he was wrong in holding that the trusts declared were not charitable, on the ground that they were trusts to provide facilities for recreation.

It is submitted, first, that a trust to provide facilities for public recreation is a valid charitable trust falling within the fourth head of charity as laid down by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel* [2] as being beneficial to the community. The authorities show that there is a distinction between a trust for the encouragement of mere sport and a trust for the encouragement of recreation. Harman J. did not consider this distinction. [Reference was made to *In re Nottage* [3]; *Shillington* v. *Portadown Urban District Council* [4]; *In re Mariette* [5]; *In re Gray*.[6]] The trustees rely particularly on Clauson J.'s decision in *In re Hadden*,[7] where he held that trusts for the provision of playing fields, public parks and gymnasiums in a specified locality constituted a good charity. If the court holds that these conveyances do not constitute valid charitable trusts, the court must override the decision in *In re Hadden*.[7] The decision in *In re King* [8] is distinguishable; there it was held that the trust was for the encouragement of mere sport.

This case is distinguishable from *Trustees of Londonderry*

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[2] [1891] A.C. 531, 583; 7 T.L.R. 657.

[3] [1895] 2 Ch. 649.

[4] [1911] 1 Ir.R. 247.

[5] [1915] 2 Ch. 284; 31 T.L.R. 536.

[6] [1925] Ch. 362; 41 T.L.R. 335.

[7] [1932] 1 Ch. 133; 48 T.L.R. 9.

[8] [1931] W.N. 232.

Presbyterian Church House v. *Inland Revenue Commissioners.*[9] Here the trust to provide for recreation is limited by the earlier trusts, and the recreation contemplated is of an educational character. There is no reason here to read the provisions for recreation disjunctively from the other provisions. The decisions of the House of Lords in *Williams' Trustees* v. *Inland Revenue Commissioners* [10] and *Inland Revenue Commissioners* v. *City of Glasgow Police Athletic Association* [11] are also distinguishable. There the trusts were for the benefit of a social club or voluntary association, not for the benefit of a section of the public.

The trustees' second submission is that these are trusts for the relief of poverty, because they are intended to provide beneficial facilities for those who would be unable to afford them. It is reasonably necessary that persons, who cannot afford to provide them for themselves, should be provided with facilities for recreation. The relief of poverty as a charitable purpose is not restricted to the relief of destitution: *In re De Carteret.*[12]

The third submission is that on the true construction of these two conveyances, the trusts declared are for charitable purposes. The trust in the first conveyance is for "the promotion of the "religious, social and physical well-being" of the persons resident in West Ham who are Methodists or likely to become Methodists. That is a charitable trust, which is not cut down by subsequent provisions as to physical training and recreation. Such provisions are merely ancillary to the main trust.

Sir Lionel Heald Q.C., A.-G., and *Denys Buckley* as amici curiae supported the contention of the trustees. On behalf of the Crown as guardian of charity we oppose the contention of the Crown as gatherer of revenue. Harman J.'s judgment involved the important question of principle whether public recreation can be the subject of a good charitable trust. Harman J. held that it could not. It is submitted that that conclusion is wrong. The point is important since, if the judge is right, his decision would affect the validity of a number of modern trusts, including trusts establishing village halls, where the general form used by the Charity Commissioners has been employed to create the trust. It is submitted that such trusts fall into the fourth class of charity as defined by Lord Macnaghten in the *Pemsel* case.[13] It is necessary, in order to decide whether a valid charitable trust has been created, to regard the trust established as a whole. If a valid trust for religious or mental improvement is established, the trust will not fall outside the area of legal charity because physical improvement is added to the objects. [*Williams' Trustees* v. *Inland Revenue Commissioners*[14]; *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[15]; *In re Pleasants*[16]; *In re Mann*[17]; *In re Hadden*[18]; *In re Spence*[19]; and *Crystal Palace Trustees* v. *Minister of Town and Country Planning*[20] were referred to.]

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[9] [1946] N.Ir. 178; 27 T.C. 431.

[10] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513.

[11] [1953] A.C. 380; [1953] 1 All E.R. 747.

[12] [1933] Ch. 103; 48 T.L.R. 555.

[13] [1891] A.C. 531.

It appears from the Local Government Act, 1894, s. 14, the Commons Act, 1899, the Open Spaces Act, 1906, the Physical Training and Recreation Act, 1937, s. 4, and the Education Act, 1944, ss. 41 and 53, that Parliament has considered the provision of village greens and other open spaces for recreation as being charitable.

The decision of the Court of Appeal in *Inland Revenue Commissioners* v. *City of London as Conservators of Epping Forest*[21] illustrates the principle of dominant purpose in construing a deed of this character. Ancillary activities will not of themselves destroy a charitable trust which is otherwise valid. A trust for the benefit of a club or private institution will not be charitable: *In re Swain*[22]; *In re Prevost.*[23] Nor must the trust be merely for the enjoyment of sport. *Williams' Trustees* v. *Inland Revenue Commissioners*[24] is distinguishable; there the general purposes of the grant were too wide. In *Farley* v. *Westminster Bank Ld.*[25] the trusts were not limited to religious purposes. The *Glasgow Police* case[26] is distinguishable since the trusts there were not confined to charitable purposes.

There is ample authority for the view that trusts which provide for the social, moral, intellectual and physical needs of a section of the community are adequately defined by trusts for providing facilities usually associated with parish halls or institutions of a similar character, and trusts providing for public recreation of a kind which will contribute to the health and welfare of a sufficient section of the community are within the intendment of the preamble to the Statute of Elizabeth I. Such trusts have a public nature analogous to trusts for the provision of a town hall, and are in principle related to trusts for the repair of bridges. Such trusts are also related to the heading in the preamble with regard to "the supportation, aid, and help of young tradesmen, "handcraftsmen." Such trusts may also be upheld on the ground that they are a species of trust recognized by a number of Acts of Parliament which in fact result in providing the public with something which a local authority might be authorized to provide by a local Act of Parliament.

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[14] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513.

[15] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[16] (1923) 39 T.L.R. 675.

[17] [1903] 1 Ch. 232.

[18] [1932] 1 Ch. 133.

[19] [1938] Ch. 96; 53 T.L.R. 961; [1937] 3 All E.R. 684.

[20] [1951] Ch. 132; [1950] 2 All E.R. 857n.; 66 T.L.R. (Pt. 2) 753.

[21] [1952] W.N. 326.

[22] [1908] W.N. 209.

[23] [1930] 2 Ch. 383; 46 T.L.R. 557.

[24] [1947] A.C. 447.

[25] [1939] A.C. 430; 55 T.L.R. 943; [1939] 3 All E.R. 491.

[26] [1953] A.C. 380.

Geoffrey Cross Q.C. and *J. H. Stamp* for the Crown. On the true construction of these two conveyances valid charitable trusts were not created. These trusts cannot be brought within the head of trusts for the relief of poverty. For a trust to be for the relief of poverty, the beneficiaries must be poor persons and the benefit conferred must be calculated to relieve that poverty. It is not true to say that there are no poor people today. It is not for the court to extend the meaning of poverty. If it is desired to bring trusts providing for amenities within this head, it should be done by statute.

If the trusts are not for the relief of poverty, they can only be valid as falling within the fourth head of charity as trusts for purposes beneficial to the community. For a trust to be valid under the fourth head of charity, the objects of the trust must be of a kind analogous to the objects set out in the preamble to the Statute of Elizabeth I, other than those objects which fall within the first three heads of charity. The fourth head thus comprises trusts which add to the common stock of the country, or of a county or a parish; such trusts are analogous to trusts for the repair of sea banks and highways. Even if the beneficiaries were the inhabitants of the two boroughs without any religious qualifications, the trusts would be bad, since the benefits conferred do not add to the common stock of the inhabitants but are merely trusts for recreation. A gift to a locality can be supported only if it is for a charitable purpose. [Reference was made to *Farley* v. *Westminster Bank Ld.*[27]; *Goodman* v. *Saltash Corporation*[28]; *Dunne* v. *Byrne*.[29]] The trusts contained in these two conveyances cannot be distinguished from those considered in *Trustees of Londonderry Presbyterian Church House* v. *Inland Revenue*

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[27] [1939] A.C. 430.

[28] (1882) 7 App.Cas. 633.

[29] [1912] A.C. 407.

Commissioners[30] and *Williams' Trustees* v. *Inland Revenue Commissioners.*[31]

Lastly, it is submitted that the beneficiaries here are not a section of the public. If membership of a class depends on relationship or employment, that class does not constitute a section of the public: *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[32] The class of Methodists as defined in these deeds is not a section of the public. For a trust to be created under the fourth head the beneficiaries must be a section of the public defined by relation to locality and locality only.

J. H. Stamp, following. These trusts must be looked at as a whole. This is not a trust for the relief of poverty. It is a trust to the Methodist Church for social and recreational purposes and to provide certain conveniences. For a trust to be within the fourth head of charity it must be one for the benefit of the whole community, not merely for a section of the community. Trusts for the prevention of cruelty to animals are charitable, not as falling within the fourth head, but as being trusts for an educational purpose. [*In re Strakosch*[33] was referred to.] On the true construction of this gift three objects of the trusts are created; the inclusion of recreation as an object prevents them being charitable.

Pascoe Hayward Q.C. in reply. The beneficiaries here are a section of the public. The class is not determined by relationship to any individual. The class is determined by locality and religion. A class so determined is a section of the community. Secondly, the trusts created confer a benefit on that section of the community in a way which is charitable. There is a trust to promote the religious, social and physical welfare of the class. This is not a trust to create a mere social club. The appeal should be allowed.

Cur. adv. vult.

May 18. The following judgments were read:—

EVERSHED M.R. I have had the advantage of reading the judgment about to be delivered by Jenkins L.J., who, after a close analysis of the language of the two relevant conveyances of August 21, 1951 (which in this, as in every case, it is first of all necessary to construe), and after references to the

[30] [1946] N.Ir. 178.

[31] [1947] A.C. 447.

[32] [1951] A.C. 297.

[33] [1949] Ch. 529; [1949] 2 All E.R. 6.

numerous authorities to which our attention was directed, has reached the conclusion that the two deeds ought to be regarded as "made to a body of persons established for charitable pur-"poses only or to the trustees of a trust so established" within the meaning of section 54 (1) of the Finance Act, 1947. I find myself in entire agreement with my Lord and with the reasons for his judgment; and, were it not for the importance of the arguments to which the case has given rise, and to the fact that we are differing from Harman J. in the court below, I should have been content to do no more than express my concurrence with Jenkins L.J. In the circumstances, however, I hope that it may be useful for me, without repeating my Lord's reasoning, to add some few considerations of my own.

On the question of construction of the deeds, I agree with Jenkins L.J. that the overriding purposes of the trusts therein respectively contained are the promotion of the religious, social and physical well-being (in the one case) and of the moral, social and physical well-being (in the other) of the class of persons therein identified, and that the other relevant provisions of the two deeds serve only to indicate the means ancillary to those objects. In this respect, therefore, the present case is, in my judgment, essentially distinct from *Trustees of Londonderry Presbyterian Church House* v. *Inland Revenue Commissioners.*[1] In the deed which was in that case under consideration, the main object of the disposition was that it should be used "as a hall "for meetings or for social or recreation purposes in connexion "with the various Presbyterian Churches in . . . Londonderry ". . . or as a hostel or boarding house or as a library or for such "other . . . purposes as the Board of Governors . . . shall . . . "think fit, it being the true intention . . . that said premises "shall be used for . . . assisting and helping in the religious "moral social and recreative life of those connected with the "Presbyterian Church in . . . Londonderry . . . in such manner "as the said Board of Governors . . . shall . . . think right."

The language I have quoted (and in doing so I have emphasized the repeated use of the disjunctive "or") contemplates on the face of it the use of the property conveyed exclusively for "social purposes," "recreation purposes," or (for example) for a boarding house, objects which, according to the authorities, would be outside the scope of exclusively charitable trusts, unless the final words in the quotation could be so construed as to confine and, as it were, rescue what had gone before. The Irish Court of Appeal held that the final words could not have that effect. In the present case, Jenkins L.J.'s analysis of very different language shows that no such rescue operation is here demanded; that the vital general words appear, not by way of an expository limitation, but as the opening and primary expression of the objects of the trusts. Although the *Londonderry* case [1] is not binding on this court, I agree with Harman J. that it must be treated with the greatest respect, and not the least so because, the law in regard to charities being the same in Northern Ireland as in England, it is plainly desirable that the decisions of the courts in the two countries should be in conformity. It is, however, unnecessary for me to say more about the *Londonderry* case [1] since, for the reasons which I have indicated, it cannot, in my judgment, be said to cover the present case, or provide the clue for its decision.

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[1] (1946) 27 T.C. 431.

The most important and the most difficult question raised in the present appeal is whether, assuming that the class of persons to be benefited can properly be said to be a section of the public, the second essential requirement for satisfying the test of a trust claiming to be charitable is satisfied, namely, whether the purposes of the deed fall within the spirit and intendment of the preamble to the Statute of Elizabeth (43 Eliz. 1, c. 4). I take as my guide the language of Lord Simonds in *Williams' Trustees* v. *Inland Revenue Commissioners* [2]: "My Lords, there are, I think, two propositions which "must ever be borne in mind in any case in which the question "is whether a trust is charitable. The first is that it is still the "general law that a trust is not charitable and entitled to the "privileges which charity confers, unless it is within the spirit "and intendment of the preamble to the Statute of Elizabeth "(43 Eliz. 1, c. 4), which is expressly preserved by section 13 (3) "of the Mortmain and Charitable Uses Act, 1888. The second is "that the classification of charity in its legal sense into four "principal divisions by Lord Macnaghten in *Income Tax Com-"missioners* v. *Pemsel* [3] must always be read subject to the "qualification appearing in the judgment of Lindley L.J. in *In "re Macduff* [4]: 'Now Sir Samuel Romilly did not mean, and I "'am certain Lord Macnaghten did not mean, to say that every

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[1] (1946) 27 T.C. 431.

[2] [1947] A.C. 447, 455; 63 T.L.R. 352; [1947] 1 All E.R. 513.

[3] [1891] A.C. 531, 583; 7 T.L.R. 657.

[4] [1896] 2 Ch. 451, 466; 12 T.L.R. 452.

" 'object of public general utility must necessarily be a charity. " 'Some may be, and some may not be.' This observation has "been expanded by Lord Cave L.C. in this House in these "words: 'Lord Macnaghten did not mean that all trusts for " 'purposes beneficial to the community are charitable, but that " 'there were certain beneficial trusts which fell within that " 'category; and accordingly to argue that because a trust is for " 'a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a " 'different meaning. So here it is not enough to say that the " 'trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be " 'a charitable trust. See *Attorney-General* v. *National Provincial and Union Bank of England.*[5] ' "

I agree with Jenkins L.J. that the trusts in the present case cannot be regarded as being for the advancement of religion, though, at any rate in one instance, they have a religious element in them. I agree also with my brother that they cannot be regarded as for relief of poverty, though the "means test" which they comprehend endows them with a certain flavour of poor relief; and I accept the argument that to show that the trusts are trusts for the advancement of religion or for the relief of poverty or both, but comprehend also other objects, will not (at least if the latter are not merely incidental in character) qualify the whole for the enjoyment of the privileges of a charity, unless those other objects are also themselves charitable.

In the course of his judgment, Harman J. was impressed by the emphasis which he discerned upon recreation as an essential purpose of the trusts, and he indicated his view (though I do not think that it was essential to his conclusion) that trusts for promoting or providing recreation are not charitable. Thus he said[6]: "If I were free to do so, I should hold that recreation is "not a charitable object"; and he thus concluded his judgment[7]: "Accordingly, if I had held that recreation was a "charitable object, I should have held that the purpose here was "public recreation."

These expressions of opinion by the judge have served to afford to us at the hearing in this court the benefit of the argument of the Attorney-General, who appeared before us as amicus curiae, being anxious lest the judge's expressions might be regarded as casting doubt upon the qualification as charitable trusts of many activities like those, for example, of the National Playing Fields Association. With all respect to him, I think that Harman J.'s opinion on trusts for recreation was too broadly stated. It is not now in doubt that trusts which may be discribed as being for " the encouragement of mere sport " (which may be the same thing as " the mere encouragement of sport ") would not be charitable (*In re Nottage* [8]). On the other hand, apart from the inference which must be drawn from the many statutes to which we were referred by the Attorney-General, beginning with the Recreation Grounds Act, 1859, it is in my judgment clear that trusts for the provision or promotion of recreation, even though comprehending organized games, may well qualify as charitable trusts if, for example, they can in their context be regarded as educative in their main purpose; and in the most recent case of *Inland Revenue Commissioners* v. *City of Glasgow Police Athletic Association*,[9] it was clearly indicated by Lord Normand that the activities there under review, which were in the event held to amount, in effect, to those of a recreational club, would have qualified for the privileges of a charity had they been but incidental to the purpose of improving the efficiency of the police force and of the encouragement of recruiting thereto.

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[5] [1924] A.C. 262, 265; 40 T.L.R. 191.

[6] [1953] 1 W.L.R. 84, 90.

[7] Ibid. 93.

Mr. Geoffrey Cross did not indeed in this court seek to argue the contrary, or to support the broad inference to which Harman J.'s expressions tended. In this court the argument for the Commissioners of Inland Revenue went rather upon the significance of the social purposes contemplated in the trusts. It was said that the present case was accordingly covered by the decision in *Williams' Trustees* v. *Inland Revenue Commissioners* [10] as authorizing, as an end in itself, the establishment and conduct of an ordinary social club. As a matter of the construction of the deeds, I do not think that such a result is justified or in accordance with the true purpose of the trusts, which I have above stated by reference to Jenkins L.J.'s judgment. Nor do I accept the view, much pressed upon us on behalf of the Commissioners, that the present case on its facts is in pari materia with *Dunne* v. *Byrne* [11] and *Farley* v. *Westminster Bank Ld.*[12] No doubt wide discretions are vested by the two conveyances in the " Leaders " therein referred to; but the discretions, in my judgment, do not relate to the choice of objects but only to the means whereby the objects are attained. It was, I think, of the essence of the decision in *Dunne* v. *Byrne* [13] that the purposes of the disposition there under review covered objects which could not fairly be regarded as being for the advancement of religion, even though the Archbishop of Brisbane might think them conducive to that end, thereby exposing its language to " such latitude of construction as to " raise no trust which a Court of Equity could carry into " execution "; and the same vice was fatal to the appeal of the vicars and churchwardens in the *Farley* case.[14]

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[8] [1895] 2 Ch. 649; 11 T.L.R. 519.

[9] [1953] A.C. 380, 395, 396; [1953] 1 All E.R. 747.

[10] [1947] A.C. 447.

[11] [1912] A.C. 407; 28 T.L.R. 257.

[12] [1939] A.C. 430; 55 T.L.R. 943; [1939] 3 All E.R. 491.

But the contentions of the Commissioners proceeded also from a somewhat broader premise, involving, as will be seen, great refinement of argument which they based upon the final paragraph in Lord Simonds' opinion in the *Williams* case.[15] For it was said that although trusts of premises " for the " purposes of a village hall " would be good charitable trusts, on the ground that thereby something was added to the common stock, and that, in the absence of express language, the purposes would be deemed by the court to be exclusively charitable, nevertheless, a trust of a building to be used for such purposes as those for which village halls are commonly held would not be charitable, on the ground that there was thereby comprehended the possibility of its use for non-charitable purposes, for example solely for social or recreational purposes. It is not necessary in the present case to express a view upon the justification for this suggested refinement. The Commissioners, however, proceeded to contend that the true test to be applied for determining whether a trust fell within the fourth class in Lord Macnaghten's classification involved, first, the process of striking out from the Elizabethan preamble all the language to which the first three claims were attributable. This process, if adopted, would leave for present purposes little or nothing but references to bridges, causeways and highways; and so Mr. Stamp, carrying the argument to a reductio ad absurdum, rhetorically asked: " Who " has ever heard of a bridge to be crossed only by impecunious " Methodists? "

I agree with Jenkins L.J. in rejecting this contention, and also with his opinion that no support can properly be found for it in the judgment of Lord Greene M.R. in *In re Strakosch.*[16]

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[13] [1912] A.C. 407, 411.

[14] [1939] A.C. 430.

[15] [1947] A.C. 447.

[16] [1949] Ch. 529; 65 T.L.R. 383; [1949] 2 All E.R. 6.

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For myself, I make bold to call the argument a heresy without any warrant in authority. It would involve a complete re-casting of both the language and the sense of the preamble, and would turn it into an exhaustive definition of charities (a task never yet attempted by Parliament) by way of a catalogue of mutually exclusive activities. The preamble has always, in my understanding, been treated by the courts as containing a number of instances from which, and from the fair analogies to which, the overriding but unexpressed conception of charity may be deduced or discerned; and I think that the fallacy of the argument may be seen from the circumstance that, for example, the words "relief of aged, impotent and poor people" must plainly be relevant to some institutions which are admittedly charitable, but which are none the less outside the scope of Lord Macnaghten's first class. If those, or any other, words, having done duty, as it were, in providing the justification for one or other of the first three classes, are to be treated as thenceforward eliminated for all other purposes from the preamble, the words that remain, even when full allowance for analogies is made, must inevitably have a scope much more restricted and too confined to admit many activities, of the kind illustrated in my brother's judgment and long since regarded as charitable, in the fair limits of the fourth class.

For the reasons which I have given, I have not been persuaded by any of the arguments put forward in support of the judgment under appeal, and I return accordingly to re-state the main purpose of the trusts of the present deeds, namely, the promotion of religious (or moral) social and physical well-being; in other words, for the attainment of the improved performance by those for whom the trust is established of their duties to God (or their consciences) their neighbours and themselves. It is, in my judgment, legitimate, also upon the special language in the present case, to rely upon the conjunctive "and." I do not say that all the means adopted must serve to promote at one and the same time all three aspects of the general purpose; but each aspect must be read in the context of the other two, so that, in my view, the trusts do not contemplate the use of the property conveyed exclusively for the promotion of one branch of the triple object in isolation from the other two, for example, the promotion exclusively of social activities as a distinct end in itself, so as to justify no more than the establishment and maintenance of a social club. For these reasons, I think that the

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main purpose in each case is within the spirit and intendment of the Statute of Elizabeth.

Upon the second question, whether the class of persons intended to be benefited can properly be treated as a section of the public, I wish to add but three sentences, for upon this matter I agree with the conclusion of the judge below. It is no doubt true that a power of selection is vested in the leaders referred to in the conveyances, but it does not seem to me that such a power affects the main characteristics of the class defined, any more than would a power of selection of the most suitable candidates vitiate the charitable quality of an otherwise good educational trust. In my view, such a power of selection does not have the effect of making the objects of the trust a number of private persons, whose essential quality or character for the purposes under review can properly be stated as relationship by the fact of blood, employment, or otherwise to some specified person or persons. The essential quality or characteristic of the intended beneficiaries in the present case remains that of being inhabitants of West Ham or Leyton, albeit that they are but a class of such inhabitants; and they fall accordingly within the language of Lord Wrenbury in *Verge* v. *Somerville*[17]: "The "inhabitants of a parish or town, or any particular class of such "inhabitants, may, for instance, be the objects of such a gift, "but private individuals, or a fluctuating body of private "individuals, cannot."

For these reasons, these appeals, in my judgment, should be allowed.

JENKINS L.J. Each of these two cases raises the question whether a conveyance of property to the appellant trustees upon certain trusts was a conveyance to a body of persons established for charitable purposes only, or to the trustees of a trust so established, within the meaning of section 54 (1) of the Finance Act, 1947, so as to attract ad valorem stamp duty at the rate of 10s. per £50 and not at the increased rate of £1 per £50 imposed by section 52 of that Act. The Commissioners have held that stamp duty at the increased rate is exigible on both conveyances, and Harman J., on appeals by case stated, has in each instance affirmed their decision, on the ground that neither conveyance was made to a body of persons, or to the trustees of a trust, established for charitable purposes only, within the legal definition of "charity." The trustees now appeal to this court with respect to both conveyances, and the issue in the two appeals, easier to state than to determine, is whether the trusts declared by those documents or either of them are, in the eye of the law, exclusively charitable trusts.

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[17] [1924] A.C. 496, 499; 40 T.L.R. 279.

[His Lordship read the relevant provisions of the two conveyances of August 21, 1951, and continued:] These being the relevant provisions of the two conveyances, I should next proceed to construe the trusts in order to ascertain the true nature of the purposes to which the yardstick of legal charity has to be applied. It is agreed that in clause 2 (*a*) of the first conveyance the words "and by the provision of facilities for religious, social "and physical training and recreation" are tautologous and make no intelligible addition to the content of the clause. Omitting them, I find clause 2 (*a*) of the first conveyance susceptible of the following analysis:—The trustees are to permit the property conveyed to be appropriated and used by the leaders for the time being of the Stratford Newtown Methodist Mission for the promotion of the religious, social and physical well-being of persons resident in the county boroughs of West Ham and Leyton: (1) by the provision of facilities (a) for religious services and instruction, and (b) for the social and physical training and recreation of persons so resident who for the time being are, in the opinion of such leaders, members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by (which I take to mean, advantages of the nature provided by) the first conveyance, and (2) by promoting and encouraging all forms of such activities as are calculated to contribute to the health and well-being of such persons (which I take to mean persons answering the description given in (1) (b) above), but subject to the proviso that the trustees are not to permit the property to be used for physical training or physical recreation or for any kind of game on Sundays, Christmas Days or Good Fridays, or (at any time) for the sale or consumption of intoxicating drink.

From this analysis, the following points emerge: First, the one and only object of the trust is the promotion of the religious, social and physical well-being of persons resident in the two county boroughs referred to. The rest of the trust is concerned with the means by which that end is to be achieved. It is impossible, without doing violence to the language of the clause, to construe it as prescribing three separate and distinct objects, namely, (a) the promotion of religious well-being, (b) the promotion of social well-being, and (c) the promotion of physical well-being. One state of complete well-being is set as the goal of the foundation, and it is defined as having three aspects, religious, social and physical. The trust will not be satisfied by the pursuit of any one aspect of this three-fold state of well-being to the exclusion of the rest; it demands the pursuit of all three. Secondly, the promotion of well-being, to my mind, denotes improvement. The object of the trust can thus be re-stated as the religious, social and physical improvement of persons resident in the two county boroughs. In other words, the object may be said to be to make persons resident in the two boroughs better people than they were before in their religious beliefs and observances, in their social relations, and in their bodily health. Thirdly, social and physical well-being cannot, in my opinion, in this context connote mere social enjoyment or mere indulgence in sport, nor, in my view, can the former connote mere material advancement in " society " or " the social " scale " in the popular sense of those expressions. Just as " religious well-being " demands the attainment of those standards in faith and in works which are expected of a good Christian, so does social well-being in this context, to my mind, demand the attainment of those standards of secular conduct and behaviour, and one might say of " manners," in the old-fashioned sense, expected of a good neighbour and a good citizen. Again, " physical well-being," though it may be in some measure attained by healthy varieties of sport, cannot to my mind here mean mere skill in, or fitness for, sporting pursuits. In the context, I think that it should be regarded as denoting that bodily health without which the other two aspects of the three-fold state of well-being aimed at by the trust cannot well be attained.

A succinct and, I think, not unwarranted paraphrase of the object of the trust is to describe it as the promotion of the performance by persons resident in the two boroughs of their duty towards God, their duty towards their neighbour, and their duty towards their own bodies as instruments upon the healthy condition of which the proper performance of the other two duties in great measure depends. Fourthly, the remaining provisions of clause 2 are directed to the means whereby the object of the trust, as already defined, is to be attained. The means prescribed consist, first, of the provision of facilities of two kinds, that is to say, facilities for religious services and instruction and facilities for social and physical training and recreation, the

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latter kind of facilities, but, according to the grammatical structure of the clause, not the former, being limited to such of the persons resident in the two boroughs as are, in the opinion of the "leaders," members or likely to become members of the Methodist Church, and of insufficient means otherwise to enjoy advantages of the nature provided by the trust: and consist secondly of the promotion and encouragement of all forms of such activities as are calculated to contribute to the health and well-being of such persons, which, as I have already indicated, must, I think, mean persons of the same description as those for whom facilities of the second kind mentioned above are to be provided. It should be noted that the last-mentioned facilities are to extend to social training as well as to social recreation, and to physical training as well as to physical recreation; and, so far as the means of attaining the object of the trust consist of the promotion and encouragement of "activities calculated to contribute to the health and well-being of such persons," I think that the previous use of the expression "well-being" in the definition of the object of the trust suffices to indicate that the same expression is used in a similar sense in the phrase "health and well-being," so that the activities to be promoted are to be such as are calculated to contribute to the religious and social well-being, as well as the health: that is to say, the physical well-being, of the persons referred to, or, in other words, calculated to further, in relation to such persons, the object of the trust as previously defined.

The corresponding provisions of the second conveyance differ from the first in the following respects: First, the object of the trust is defined in clause 2 (*a*) as "the promotion of the moral social and physical well-being" of the class of beneficiaries therein described, "moral" thus taking the place occupied by "religious" well-being in the first conveyance. This change of language is presumably due to the fact that whereas the property comprised in the first conveyance included a mission church and lecture room, where religious services and instruction could conveniently and appropriately be carried on, the property comprised in the second conveyance consisted of a playing field, pavilion and groundsman's bungalow, and was thus hardly suitable for formal religious instruction or observances. But, whatever the reason for the change of language, the claim to charitable status of the trust declared by the second conveyance must be judged on the footing that its object is the promotion of "moral, social and physical well-being," and not the promotion of "religious, "social and physical well-being," as in the case of the trust declared by the first conveyance. As I have said before, I think that the "promotion of well-being" is equivalent to "improvement." This makes the trust declared by the second conveyance a trust for moral, social and physical improvement. Moral improvement would, I think, undoubtedly include religious improvement, but it is a wider term, and would also extend to the inculcation of a desirable code of secular ethics; for example, the secular (though also Christian) virtues of honesty, fair play, unselfishness and so on. Moral improvement, in its wider significance, to some extent overlaps with social improvement in the sense I have attributed to "social improvement" in my analysis of the corresponding provisions of the first conveyance; but I think that the two conceptions are sufficiently distinct to warrant the attribution to "social well-being" in the second conveyance of the same meaning as I have assigned to it in the first. My observations in relation to the first conveyance, to the effect that it prescribes one object with three aspects, apply equally to the second, the only difference being that, in the case of the latter, one of the three aspects is "moral" instead of "religious" well-being.

Secondly, the class of beneficiaries prescribed by clause 2 (*a*) of the second conveyance is defined for all purposes as consisting not simply of persons resident in the county boroughs of West Ham and Leyton, but of persons so resident who for the time being are, in the opinion of the leaders of the Stratford Newtown Methodist Mission, members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by the second conveyance, whereas under the first conveyance these qualifications in regard to church membership or likelihood of church membership, and insufficiency of means, are, as pointed out above, only applicable to certain of the means prescribed for the attainment of the object of the trust (that is to say, the provision of facilities for social and physical training and recreation and the promotion and encouragement of activities calculated to contribute to health and well-being) and do not apply to the provision of facilities for religious services and instruction.

Thirdly, in conformity with the substitution of "moral" for "religious" well-being in the object of the trust, the means prescribed by clause 2 (*a*) of the second conveyance take the form of (a) the provision of facilities for moral, social and physical training and recreation, and (b) the promotion and encouragement of all forms of such activities as are calculated to contribute to the health and well-being of such persons. It should be noted that, as in the case of the first conveyance, these are not in themselves substantive objects, but merely means prescribed for the attainment of the sole tripartite object already declared; and further that, with the substitution of "moral" for "religious" well-being, the observations made above as to the meaning of "health and well-being" in the second conveyance apply equally here.

Such being, in my opinion, the true construction of the trust declared by each of the two conveyances, and the true character of the object of such trust ascertained with due regard to the distinction between object and means, I pass to the question whether, in both or either of the two cases, the object of the trust falls wholly within the ambit of legal charity. In view of the form taken by one of the arguments presented on behalf of the Commissioners, I find it necessary to begin my consideration of this question by attempting a return to first principles. The starting point for this purpose is the preamble to the Statute of Elizabeth (43 Eliz. 1, c. 4). Of that enactment, Lord Macnaghten said in *Pemsel's* case [18]: "The object of that statute "was merely to provide new machinery for the reformation of "abuses in regard to charities. But by a singular construction "it was held to authorize certain gifts to charity which otherwise "would have been void. And it contained in the preamble a list "of charities so varied and comprehensive that it became the "practice of the court to refer to it as a sort of index or chart. "At the same time it has never been forgotten that the 'objects "'there enumerated,' as Cranworth L.C. observes, 'are not to "'be taken as the only objects of charity but are given as "'instances.'". In the same speech,[19] comes the celebrated classification of charitable purposes which, as pointed out by Lindley L.J. in *In re Macduff*,[20] is a passage from Sir Samuel Romilly's argument in *Morice* v. *Bishop of Durham* [21]: "'Charity' in its legal sense comprises four principal divisions: "trusts for the relief of poverty; trusts for the advancement of "education; trusts for the advancement of religion; and trusts "for other purposes beneficial to the community, not falling "under any of the preceding heads."

It is, of course, well settled that, although this classification only mentions benefit to the community under its fourth head,

[18] [1891] A.C. 531, 581.

[19] Ibid. 583.

[20] [1896] 2 Ch. 451, 467.

[21] (1805) 10 Ves. 522, 532.

no trust, to whichever head it is sought to be assigned, is charitable unless it is directed to the public benefit (see *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[22]). On the other hand, it is equally well settled that a trust is not to be held charitable merely because it is directed to the public benefit, and that to be so held a trust must be not only directed to the public benefit but also within the spirit and intendment of the Statute of Elizabeth; in other words, it must be both (a) beneficial to the community and (b) beneficial in a way the law regards as charitable (see *Williams' Trustees* v. *Inland Revenue Commissioners*[23]). There is, however, a class of cases, typified by *Goodman* v. *Mayor of Saltash*,[24] which are by no means easy to reconcile with the general proposition I have just stated, because they appear to proceed on the ground thus formulated by Lord Selborne L.C. in the last-mentioned case[25]: " A gift subject to " a condition or trust for the benefit of the inhabitants of a " parish or town, or of any particular class of such inhabitants, is " (as I understand the law) a charitable trust."

In view of the comments made on this line of cases in *Williams' Trustees* v. *Inland Revenue Commissioners*,[26] it would seem that they should not now be regarded as authoritative, save in so far as they can be explained on the ground that the particular purpose was regarded as falling within the spirit and intendment of the preamble to the Statute of Elizabeth.

For reasons which will hereafter appear, I propose in the first instance to assume that the persons to whose benefit the trust in each of the two cases now before the court is directed constitute a sufficient section of the community to provide that element of public benefit which is essential to all legal charity. On this assumption, how does the trust in each case stand in relation to Lord Macnaghten's classification? To pursue that inquiry head by head: First, is either trust for the relief of poverty? This was affirmatively argued by Mr. Pascoe Hayward, on behalf of the trustees in both cases, on the strength of the references in both conveyances to " persons . . . in the opinion " of such leaders . . . of insufficient means otherwise to enjoy " the advantages provided by these presents." He submitted, in my view rightly, that " poverty " in relation to charity is a relative term not confined to destitution, and referred to *In re*

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[22] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[23] [1947] A.C. 447, 452.

[24] (1882) 7 App.Cas. 633.

[25] Ibid. 642.

[26] [1947] A.C. 447, 459, 460.

De Carteret[27] as typical of the authorities on this point. He contended, therefore, that insufficiency of means otherwise to enjoy the advantages provided by the two conveyances amounted to " poverty " in the charitable sense, and that the provision of those advantages for persons labouring under such insufficiency of means accordingly amounted to relief of poverty. I cannot accept this argument, which, to my mind, involves an unwarrantable extension of the charitable conception of relief of poverty. It should, however, be noted that the trust in each case has a certain affinity to trusts for the relief of poverty, in that it is designed to provide benefits for persons who cannot afford to provide similar benefits for themselves.

Secondly, is either trust for the advancement of education? The answer here must I think, be " No," though the object in each case is akin to the advancement of education in the sense that " religious social and physical improvement " or " moral social and physical improvement " may be said to form part of any liberal scheme of education and, indeed, to comprise some of the essential purposes of any education worthy of the name. Thirdly, is either trust for the advancement of religion? The answer here, as regards the first conveyance, must be " partly, but not exclusively "; for religious improvement is only one of the three ingredients in the tripartite object. As regards the second conveyance, the answer must be, " at best " no more than partly so, and only partly so in the sense that " moral improvement may be said to include religious improve- " ment." Fourthly and finally, is either trust for some exclusively charitable purpose beneficial to the community not falling under any of the preceding heads? The elimination of the first three heads means that, if either trust is to qualify for charitable status at all, it must do so under this fourth head.

On this part of the case there was presented on behalf of the Commissioners an argument which, I confess, was new to me. It is of this nature: In order to determine whether a given trust is charitable, one must set Lord Macnaghten's classification alongside the preamble to the Statute of Elizabeth, and ask oneself with respect to each of the first three heads seriatim whether the trust is charitable under that head. As each head is eliminated as inapplicable to the particular case, one must strike out of the preamble all instances of charity referable to that head. If the trust under consideration cannot be brought

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[27] [1933] Ch. 103; 48 T.L.R. 555.

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strictly within any of the first three heads, or a combination of any two or more of them, then it can only be charitable under the fourth head, if it strictly corresponds to, or bears a sufficiently close analogy to, one of the few remaining instances of charity which are left in the preamble, after those referable to the first three heads have been struck out. In other words, according to this argument, a trust in order to be charitable must be either (1) strictly for the relief of poverty, or (2) strictly for the advancement of education, or (3) strictly for the advancement of religion; or else, failing these three, it must be (4) for some purpose mentioned in, or analogous to some purpose mentioned in, the preamble, exclusive of those purposes mentioned in the preamble which have been eliminated as referable to any of the first three heads. I find it difficult to say exactly what instances of charity are to be taken as remaining in the preamble after the process of elimination above described has been carried out. But, for the purposes of the argument I am now stating, they can, I think, be regarded as comprising such purposes as " the repair of bridges ports havens causeways . . . " sea banks and highways." I omit churches from this enumeration as referable to, and indeed providing the whole basis for, the third head of the classification.

Thus, according to this argument, if a trust cannot be brought strictly within any of the first three heads of poverty, education or religion, it can only be brought under the fourth head if it has for its object the repair of such things as bridges, highways and the like, or the provision of some benefit analogous to the benefit conferred by such repair. According to the argument I am now stating, the analogy extends, but is confined, to purposes which add to the common stock of the community in the shape of lands, works, buildings and so forth dedicated to general use or enjoyment by the public or a section of the public. Such purposes are said to constitute in themselves a separate and distinct head of charity, so that the provision simpliciter of a village green or village hall for the use of the inhabitants of the village of " X," without any definition of the purposes for which such green or hall is to be used, is charitable in its own right, even if the purposes for which it is in fact used (and for which it is obviously intended) are not in themselves of an exclusively charitable nature. On the other hand, it is said that if the trust declared concerning the village green or the village hall defines the purposes for which it is to be used, albeit the very purposes for which premises of that description are invariably used and intended, then the trust is not charitable, unless the declared purposes fall strictly within one or other of the first three heads of the classification. It is said further that, for the purposes of the fourth head of charity as delimited by this argument, the public or section of the public to be benefited must be the public at large, without any restriction otherwise than by reference to residence in some specified area, and that a class restricted to such members of the public resident in a specified area as are members of some particular religious sect or denomination does not, at all events for the purposes of this head, constitute a sufficient section of the public.

The bearing of this argument on the two cases now before the court may be thus stated: (a) The object of the trust in the first conveyance being "the promotion of religious, social and "physical well-being," and the object of the trust in the second conveyance being the promotion of "moral, social and physical "well-being," such object does not in either case fall strictly or exclusively within any of the first three heads of the classification. Those three heads and all instances of charity in the preamble which are referable thereto must, therefore, be eliminated from further consideration, and neither trust can claim charitable status by analogy to anything contained in those three heads or those instances. (b) There remains only the fourth head. But this is not available here because, firstly, the fourth head only includes such things as the repair of bridges and highways and matters analogous thereto, and no such analogy is to be found in the object of either trust; secondly, the declared object in each case not being strictly or exclusively within any of the first three heads of the classification, and a claim to charitable status by analogy to those three heads being inadmissible, where none of them is strictly applicable to the trust in question, the trust is not in either of the two cases charitable at all; and a trust for purposes not in themselves of a charitable nature is not to be held charitable merely because it is directed to the benefit of the public or a section of the public (see *Williams' Trustees* v. *Inland Revenue Commissioners* [28]). (c) At all events for the purposes of the fourth head, the trust is not in either case directed to a class of beneficiaries which amounts to a section of the public, because, in the case of the first conveyance, all the means prescribed for carrying out the object (other than the provision of facilities for religious services and instruction), and, in the case of the second conveyance, both the object and the means of carrying it out, are limited to persons resident in the two county boroughs named who, in the opinion of the leaders referred to, are members or likely to become members of the Methodist Church and of insufficient means otherwise to enjoy the advantages provided by the conveyance.

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[28] [1947] A.C. 447.

I have stated this argument at some length on account of its novel and, to my mind, subversive character. I am not concerned to dispute the charitable character of a trust to provide a village green or a village hall for the use of the inhabitants of the village of "X," or that the charitable character of such a trust is referable to the fourth head of the classification. But I am concerned to dispute the proposition that the fourth head of the classification does not admit of the inclusion within the ambit of legal charity of purposes analogous to the relief of poverty, the advancement of education, and the advancement of religion, although not strictly comprised in any of those three heads.

In re Strakosch [29] was referred to, and it was suggested that support was to be found for the argument in the judgment of Lord Greene M.R., where he said [30]: "Lord Macnaghten's "fourth class is represented in the preamble by the repair of "bridges, etc., and possibly by the maintenance of Houses of "Correction." But if the passage in which this sentence occurs is read as a whole I think that it really tells the other way: "In *Williams' Trustees* v. *Inland Revenue Commissioners*,[31] "the House of Lords has laid down very clearly that in order to "come within Lord Macnaghten's fourth class, the gift must be "not only for the benefit of the community but beneficial in a "way which the law regards as charitable. In order to satisfy "the latter it must be within the 'spirit and intendment' of the "preamble of the Statute of Elizabeth. That preamble set out "what were then regarded as purposes which should be treated "as charitable in law. It is obvious that as time passed and "conditions changed common opinion as to what was properly "covered by the word charitable also changed. This has been "recognized by the courts as the most cursory examination of "the cases shows. In order to be within the spirit and intend- "ment of the preamble we take it that one must find something "charitable in the same sense as the recited purposes are "charitable. Lord Macnaghten's fourth class is represented in "the preamble by the repair of bridges, etc., and possibly by the

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[29] [1949] Ch. 529.

[30] Ibid. 537.

[31] [1947] A.C. 447.

"maintenance of Houses of Correction. This negatives any "suggestion that charitable must be confined to the poor (*Verge* "v. *Somerville* [32]). We have come to the conclusion that though "undoubtedly of benefit to the community the purpose under "consideration is not 'charitable' in the sense in which the "benefits to the community instanced in the preamble are "charitable. The benefit, as we understand it, does not have to "be in any way ejusdem generis with the recited purposes but it "has to be charitable in the same sense."

There are many cases in the books in which purposes not falling within any of the first three heads have been held to be charitable, when they could not possibly have been held such according to the method of applying the classification contended for on behalf of the Commissioners. I need only refer to *In re Wedgwood*,[33] where a trust for the protection and benefit of animals was (to quote the headnote): "Held, a good and valid "charitable trust, on the ground that it was calculated to promote "public morality by checking the innate tendency to cruelty," and *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society*,[34] where there was a society whose substantial object was the promotion of agriculture.

I think this well-known passage in the judgment of Chitty J. in *In re Foveaux*,[35] still holds good: "Cases arise, such as "the present, in which it is not easy to ascertain whether a "particular institution is or is not a charity. Charity in law is "a highly technical term. The method employed by the court "is to consider the enumeration of charities in the Statute of "Elizabeth, bearing in mind that the enumeration is not "exhaustive. Institutions whose objects are analogous to those "mentioned in the statute are admitted to be charities; and, "again, institutions which are analogous to those already "admitted by reported decisions are held to be charities. The "pursuit of these analogies obviously requires caution and "circumspection. After all, the best that can be done is to "consider each case as it arises, upon its own special circum-"stances." In my view, given the requisite element of public benefit, the question in any given case is simply whether the trust claimed to be charitable is within the spirit and intendment of the Statute of Elizabeth, and that question is to be answered by reference to the preamble as a whole, and in the light of the decided cases.

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[32] [1924] A.C. 496, 502.

[33] [1915] 1 Ch. 113; 31 T.L.R. 43.

[34] [1928] 1 K.B. 611; 44 T.L.R. 59.

[35] [1895] 2 Ch. 501, 504.

I need not repeat what I have already said about the construction of the two conveyances. My view as to the object of the trust in the first conveyance may be summed up by saying that the object is to make the people to whose benefit it is directed better Christians, better citizens, and better physical specimens; and as to the second conveyance, by saying that the object is to make such people morally better, or, in other words, more virtuous persons, better citizens, and better physical specimens. Nor need I repeat what I have already said about the means prescribed for attaining the object of the trust in either case. The salient points here are, first, that they are mere means for attaining the object, and not ends in themselves; and secondly, that the references which they contain to "training and "recreation," not recreation alone, bear out my view as to the improving character of the object itself. A third important consideration is the limitation, partial in the first conveyance and total in the second, of the benefit of the trust to persons resident in the two county boroughs who, in the opinion of the leaders referred to, are "of insufficient means otherwise to enjoy the "advantages provided by these presents." I omit at this stage the religious qualification as relevant to the question of sufficiency of public benefit, to which I will in due course return.

Given the requisite element of public benefit, and if I am right in the view I have formed as to the true nature of the object of each of these two trusts, is that object charitable within the spirit and intendment of the preamble? In the first case, so far as the object is directed to religious improvement, it falls, of course, fairly within the third specific head of the classification, namely, the advancement of religion. In the second case, so far as the object is directed to moral improvement, there is undoubted authority for the proposition that a trust for the moral improvement of the public in general or of a section of the public is charitable within the spirit and intendment of the preamble, although it is not one of the specific instances of charity therein enumerated: see, for example, *In re Wedgwood.*[36] I therefore have no difficulty so far in according charitable status to both trusts. To deal next with the third aspect of the object of the trust in each case, namely, physical improvement, this aspect is perhaps more controversial, but I think that in principle a trust for the physical improvement of the public generally or of a section of the public should be held to be within the spirit and intendment of the preamble. I think that it would be irrational to exclude physical improvement, while including moral improvement. Both objects are in their respective ways equally desirable, and equally in the public interest. Moreover, if it be charitable to relieve sickness, it should by parity of reasoning be charitable to promote physical health. There is at all events some authority in favour of this view and none which, properly understood, can in my opinion fairly be held to be against it. But the validity of my conclusion upon this point of course depends on the correctness of the meaning I have assigned to "the promotion of physical well-being" in the context afforded by the two conveyances. If, contrary to my opinion, it meant what has been termed "the encouragement of mere "sport," then there is binding authority for the view that it would not be charitable.

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[36] [1915] 1 Ch. 113.

Finally, as to the second aspect of the tripartite object—"the promotion of social well-being," or, to use the paraphrase I have ventured to adopt, "social improvement," this aspect of the object undoubtedly presents the greatest difficulty. If what is meant is the mere provision of facilities for social enjoyment, then this aspect of the object could not, I think, fairly be brought within the spirit and intendment of the preamble. But, if I am right in my view that it bears the meaning I have endeavoured to describe above, then it means, in effect, the inculcation of socially acceptable standards of conduct and behaviour in relation to other people—standards of conduct and behaviour such as are to be expected of a good neighbour or good citizen—and does in my opinion fairly fall within the spirit and intendment of the preamble; for, so viewed, its aim is to promote, amongst the persons to whose benefit the trust is directed, the practical application of sound ethical principles in their relations with other people, and it is accordingly in the nature of a trust for the moral improvement of a section of the public. I am fortified in my conclusion with respect to the second and third aspects of the trust in the first conveyance, and all three aspects of the trust in the second conveyance, not only by the references to training in the prescription of the means by which the object is to be attained, but also by the limitation of the benefit of the trust to persons of insufficient means to enjoy the advantages provided. This imbues the trust with one of the distinctive characteristics of charity. As Lord Haldane said in *Attorney-General* v. *National Provincial and Union Bank of England*[37]: "In the case of a gift for charitable purposes there is a desire to "profit people who would not be profited without your gift—that "is the dominant motive."

If I am right so far, it matters not that the means prescribed in both cases include "recreation" as well as "training." Any scheme of moral, social and physical improvement must, as indeed must any scheme of education in the conventional sense, include a greater or less degree of recreation. Training and recreation go hand in hand, and the former is often best achieved through the latter. This is particularly, but not exclusively, true with respect to physical improvement. I would, moreover, repeat that the means prescribed must be viewed as means to an end, not as ends in themselves.

As seems inevitable in these charity cases, we were referred to a plethora of authorities, to some of which I should next allude. *In re Nottage*,[38] was cited for the proposition that the encouragement of mere sport is not a charitable purpose. With regard to this authority, I need only say that in my view neither of the trusts here in question is a trust for the encouragement of mere sport. Somewhat nearer in point is the Irish case of *Shillington* v. *Portadown Urban District Council*,[39] where a trust for providing the means of healthy recreation for the residents of a named town and surrounding districts was held charitable. Reference was also made to *In re Mariette*[40] and *In re Gray*,[41] as bearing on the charitable character of trusts for the promotion of physical efficiency. In the former case the provision of facilities for games, and a prize for athletic sports at a school, were held charitable, on the ground that bodily development was just as much a part of education as mental development, and accordingly that these gifts were charitable, as being for the advancement of education. In the latter case the provision of the nucleus of a fund for the promotion of certain outdoor sports in a particular regiment was held charitable, as being for the promotion of the physical efficiency of the Army, following *In re Good*,[42] where a trust to provide a library for an officers' mess was held charitable, as tending to promote the mental efficiency of the Army. These cases are, of course, far removed in subject-matter from the two cases now before the court, but I think that they are of some assistance, as showing that a trust for physical, no less than mental or moral, improvement may be charitable.

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[37] [1924] A.C. 262, 267.

[38] [1895] 2 Ch. 649.

[39] [1911] 1 Ir.R. 247.

[40] [1915] 2 Ch. 284; 31 T.L.R. 536.

[41] [1925] Ch. 362; 41 T.L.R. 335.

[42] [1905] 2 Ch. 60; 21 T.L.R. 450.

We were also referred to *In re Hadden*,[43] where a trust (inter alia) to provide playing fields, parks and gymnasiums in, in effect, centres of working-class population, was held on construction to have for its object the health and welfare of the working classes by the supply of healthy recreation mainly in the open air, and in particular by providing playing fields, parks and gymnasiums, and as such to be a valid charitable gift, the judge founding himself primarily upon the recognition contained in section 6 of the Mortmain and Charitable Uses Act, 1888, of the dedication of land to the recreation of the public as a charitable use. In *In re Scowcroft*[44] a gift to the vicar for the time being of a parish of a building used as a village club and reading room "to be maintained for the furtherance of conservative principles "and religious and mental improvement" was held charitable, notwithstanding the inclusion of the reference to conservative principles, as being in effect a gift for the furtherance of religious and mental improvement amongst a section of the public. *In re Mann*[45] was a case of a gift to an institute established for the general benefit of the inhabitants of a named village, and this was held charitable, as being for the benefit of the inhabitants. The authority of this case is perhaps open to question in view of what was said in *Williams' Trustees* v. *Inland Revenue Commissioners*[46] about the class of cases headed by *Goodman* v. *Mayor of Saltash*.[47] In *In re Spence*[48] a gift to a local authority for the erection of a hall for public purposes was held charitable. This is perhaps open to the same comment. In *Crystal Palace Trustees* v. *Minister of Town and Country Planning*[49] the objects of the Crystal Palace, which was to be held as a place of public resort and recreation, were held to be charitable.

Nearer the mark for present purposes is the Irish case of *Trustees of Londonderry Presbyterian Church House* v. *Commissioners of Inland Revenue*.[50] The objects of the trust there in question are thus set out: "The appellants are the present "trustees of a deed of trust dated November 21, 1922, whereby "the trusts affecting the property concerned are declared in the

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[43] [1932] 1 Ch. 133; 48 T.L.R. 9.
[44] [1898] 2 Ch. 638; 15 T.L.R. 4.
[45] [1903] 1 Ch. 232.
[46] [1947] A.C. 447.
[47] 7 App.Cas. 633.
[48] [1938] Ch. 96; 53 T.L.R. 961; [1937] 3 All E.R. 684.
[49] [1951] Ch. 132.
[50] (1946) 27 T.C. 431, 435.

"following terms: 'Upon trust to permit the same or any part "'thereof to be used as a hall for meetings or for social or recreation purposes in connection with the various Presbyterian "'Churches in the City of Londonderry and the surrounding "'district or as a hostel or boarding house or as a library or for "'such other purpose or purposes as the Board of Governors "'hereinafter defined or any Board of Governors or committee to "'be substituted therefor in manner hereinafter appearing shall "'from time to time think fit it being the true intention and "'meaning of these presents that said premises shall be used "'for the purposes of assisting and helping in the religious moral "'social and recreative life of those connected with the Presbyterian Church in the City of Londonderry and surrounding "'district in such manner as the said Board of Governors or "'substituted Board of Governors or committee shall from time "'to time think right.'" MacDermott J., in a closely reasoned judgment, held these trusts to be charitable.

His decision was reversed in the Court of Appeal. Andrews C.J. said [51]: "The authorities, whose number is legion, upon whether "particular trusts may fall within or without Lord Macnaghten's fourth category baffle all efforts on my part to reconcile "them with one another, and no useful purpose would be served "in the circumstances by reviewing them. Judicial minds have "operated not always consistently on facts admittedly different; "and the result can only be described as in a measure chaotic. "I shall simply content myself with saying that I find nothing in "the statutes referred to which would assist me in holding that "the trusts in the present case for religious, moral, social and "recreative purposes, excluded as I have held them to be from "Lord Macnaghten's third class, fall within the fourth class as "a valid charitable trust. The test is not whether the objects "or purposes aimed at are beneficial to or receive the general "acceptance of the community. It is simply whether they "conform or not to the requirements and essentials of a legal "charity." The case is also relevant on the question whether persons of a particular religious denomination resident in a specified area are or are not a sufficient section of the public for the purposes of a charitable gift. MacDermott J. and Andrews C.J. held that they were, Babington L.J. held that they were not, while Black J. expressed no opinion on the point.

Comparison of the trusts in the *Londonderry* case [50] with those in the two conveyances with which we are here concerned, seems to me to show that case to be clearly distinguishable. The trusts in the *Londonderry* case [50] begin by enumerating a wide range of purposes, by no means all of which would necessarily be charitable, and end by saying: "it being the true intention and meaning "of these presents that said premises shall be used for the "purposes of assisting and helping in the religious moral social "and recreative life of those connected with the Presbyterian "Church in the City of Londonderry and surrounding district in "such manner as the said Board of Governors or substituted "Boards of Governors or committee shall from time to time think "right." Trusts in such a form are, I think, well capable of being held to range beyond the ambit of legal charity, without involving a similar conclusion in the two present cases.

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[50] (1946) 27 T.C. 431, 435.

[51] Ibid. 446.

The case of *Williams' Trustees* v. *Commissioners of Inland Revenue* [52] is a decision of the House of Lords and, as such, of course, binding upon this court. But there again the objects were different from, and wider than, those in the present two cases. It is further to be observed that the basis of Lord Simonds's judgment is contained in this passage [53]: "But it is "just because the purpose of the trust deed in this case is said "to be beneficial to the community or a section of the community and for no other reason that its charitable character "is asserted. It is not alleged that the trust is (*a*) for the "benefit of the community and (*b*) beneficial in a way which the "law regards as charitable. Therefore, as it seems to me, in its "mere statement the claim is imperfect and must fail." It should be added that in summarizing his view as to the quality of the trusts there in question Lord Normand said [54]: "In the "present case the decision of the Commissioners was that, while "certain features of the institute conformed to the idea of "charity, they were not so dominating nor was the general "character of the institute such as effectively to distinguish it "from an ordinary social club. In my opinion this conclusion is "amply supported by the facts and is well founded in law."

If, on the true construction of the two conveyances here in question, the purposes of the trusts were those of a social club, then of course they would not be charitable. If, on the other hand, the construction I have placed on the two conveyances is right, then in my view the trusts are charitable. In the end, all turns on the construction of the two conveyances.

[50] (1946) 27 T.C. 431, 435.

[52] [1947] A.C. 447.

[53] Ibid. 455.

[54] Ibid. 460.

Much reliance was placed for the Commissioners on *Dunne* v. *Byrne*,[55] where, to quote the headnote, it was held that a residuary bequest "to the Roman Catholic Archbishop of "Brisbane and his successors to be used and expended wholly "or in part as such Archbishop may judge most conducive to "the good of religion in this diocese" is not a good charitable bequest and is void. The expression used by the testator is not identical with the expression "for religious purposes."

But as to the argument founded on this case and the case of *Farley* v. *Westminster Bank Ld.*,[56] where a gift "for parish "work" was held not to be charitable, I would observe that they proceeded on the ground that the objects authorized extended to purposes other than religious purposes in the strictly charitable sense, and that once it was found that the purposes prescribed were not strictly religious purposes, there was no other head of charity to which they could be assigned. But if the view which I have formed as to the true construction of these two conveyances is right, then the object prescribed in each of the two cases is an exclusively charitable object.

We were also referred to *Inland Revenue Commissioners* v. *City of Glasgow Police Athletic Association*,[57] but I do not think that it has any bearing here, the decision of the House of Lords being simply to the effect that the association there in question had two objects, one of which, namely, the increasing of the efficiency of the police force, was charitable, while the other, namely, the benefit of its own members as individuals, was not, and accordingly that the association was not established for charitable purposes only. I should, however, observe that with respect to *In re Good*[58] and *In re Gray*,[59] Lord Normand said[60]: "So far as they are founded on the principle that gifts "exclusively for the purpose of promoting the efficiency of the "armed forces are good charitable gifts, they are, in my opinion, "unassailable, but that the decision that the actual gifts were "of that nature is more doubtful"; and that Lord Morton[61] expressed his concurrence in this comment on those two cases.

Finally, on this part of the case, I should mention that in the course of the argument we were referred to a large number of Acts of Parliament as giving, in effect, statutory recognition to the charitable status of public open spaces, parks, recreation

[55] [1912] A.C. 407.
[56] [1939] A.C. 430.
[57] [1953] A.C. 380.
[58] [1905] 2 Ch. 60.
[59] [1925] Ch. 362.
[60] [1953] A.C. 380, 391.
[61] Ibid. 401.

grounds and the like. I will not burden this already over-long judgment by referring to them in detail. Suffice it to say that, so far as they go, they perhaps afford some degree of support to the trustees' case (compare *In re Hadden* [62]). But, as I have said before, I think that the issue really turns upon the true construction of the two particular conveyances now before us, and I prefer to found my decision upon that.

It remains to consider the question of public benefit. Are persons resident in the county boroughs of West Ham and Leyton who are, in the opinion of the leaders referred to, members or likely to become members of the Methodist Church, a sufficient section of the public for the purposes of a charitable trust? Speaking for myself, I have no doubt that they are. The nexus provided by membership of a particular religious sect or persuasion has, so far as I know, never (except by Babington L.J. in the *Londonderry* case [63]) been held to be a private or personal one, so as to make its members for the purposes of this branch of the law a mere aggregate of private individuals, as the employees or former employees of a particular company, though numerous, were held to be in *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[64] Certainly this view has never been suggested in the case of educational trusts, although there must be very many educational trusts which are by their terms confined to persons of particular religious sects or persuasions. In particular, large numbers of educational trusts may have been set up since the Reformation for the exclusive benefit of members of the Church of England. All such trusts would be bad, as not being for the public benefit, if the members of a particular sect or persuasion were held not to constitute a section of the public.

Again, trusts for the advancement of religion are commonly confined to members of some particular religious sect or denomination, but have never been held on that account to lack the necessary element of public benefit. If the members of a particular religious sect or denomination resident in a particular area are a section of the public for the purposes of educational or religious charities, I fail to see why they should not also be such for the purposes of any other form of charity, and accordingly (notwithstanding the contrary views expressed by Babington L.J. in the *Londonderry* case,[65] and submitted in argument on behalf of the Commissioners) I hold them to be such for the purposes of the present case. Plainly the inclusion of prospective or potential members of the particular denomination cannot make the class any the less a section of the public.

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[62] [1932] 1 Ch. 133.

[63] 27 T.C. 431.

[64] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

[65] 27 T.C. 431, 451.

It remains only to deal with the submission made for the Commissioners to the effect that the religious qualification in this case has the effect of making the trusts void for uncertainty. So far as I know, this doctrine has never been applied to religious qualifications prescribed in charitable trusts, and the cases of *In re Mylne* [66] and *In re Gott* [67] provide some authority for the view that it is inapplicable. It is to be observed, moreover, that here the admission of persons to participation in the benefit of the trust under each conveyance (apart from the exception already noted as regards the first) is made to depend on the leaders' opinion as to their membership of, or the likelihood of their becoming members of, the Methodist Church. The leaders must form an honest opinion on the matter to the best of their ability, and persons claiming to be eligible must be admitted or rejected in accordance with such opinion. Therefore, so far as I can see, no question of uncertainty arises in the matter of religion, or, I should add, in the matter of insufficiency of means which is also referred to the opinion of the leaders.

Finally, I would say that, in reaching a conclusion favourable to the trustees on the question of public benefit, I have not overlooked what was said in *Williams' Trustees* v. *Inland Revenue Commissioners* [68] as to the difficulty of finding the community to be benefited in that case, in view of the extraordinarily wide definition of "Welsh people" contained in the trust deed; but I regard that case as clearly distinguishable, as there seems to me to be no similar difficulty in ascertaining the very differently constituted community to whose benefit the trusts of the two conveyances now before the court are directed.

For these reasons, I would allow both appeals.

HODSON L.J. The first contention of the trustees is that these trusts can be supported as trusts for the relief of poverty. The trustees argued that, in considering the relief of poverty, it was not necessary to confine oneself to cases of destitution. They relied in particular on the judgment of Maugham J. in *In re De Carteret*, [69] who declared to be the objects of charity widows with young children whose income was not more than £120 a year. They contended that, since the bare necessities of life are now available to all, the courts must move with the times and the donor of a charitable gift is now bound to provide for a different range of objects. If this last premise is true, which is at least doubtful, it is, I think, not open to the courts to extend the range of poverty in the light of the activities of the welfare State. This must be achieved, if at all, by legislation.

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[66] [1941] Ch. 204; 57 T.L.R. 311; [1941] 1 All E.R. 405.

[67] [1944] Ch. 193; 60 T.L.R. 214; [1944] 1 All E.R. 293.

[68] [1947] A.C. 447.

[69] [1933] Ch. 103.

When one considers the class of persons described in the trusts, they are not, in my opinion, to be regarded as persons in need. As Harman J. said, the word "relief" in the phrase "relief of aged, impotent and poor people," contained in the preamble to the Statute of Elizabeth, seems to connote need of some sort, either need of a home or of the means to provide for some necessity or quasi necessity. There is here no suggestion of the relief of poverty in the operative part of the documents, and the donor has sought merely to restrict the benefits given to persons who could not afford certain amenities. The class is not, in my opinion, a class of poor persons within the language of the preamble, nor would the benefits provided have the effect of making them less poor. I am in full agreement with the judge in rejecting the contention that this is a poverty case.

The main argument of the trustees was, however, directed to showing that the trusts were a good charitable class within the fourth class of *Pemsel's* case [70] as "trusts for other purposes "beneficial to the community, not falling under any of the "preceding heads"; that is to say, the heads of poverty, education or religion. Under this head, the authorities are no doubt difficult, but the qualification to the fourth class, referred to by Lord Simonds in *Williams' Trustees* v. *Inland Revenue Commissioners*,[71] and set out in Harman J.'s judgment, must be remembered. The effect is shortly stated in the headnote: "No "trust can be charitable unless it is beneficial to the community "in a way which the law regards as charitable." As Lord Simonds said [72]: "A trust is not charitable and entitled to the "privileges which charity confers, unless it is within the spirit "and intendment of the preamble to the Statute of Elizabeth, "(43 Eliz. 1, c. 4)."

Turning to the deeds in question here, the governing words in one case are "for the promotion of the religious social and "physical well-being," and in the other case "the promotion of

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[70] [1891] A.C. 531, 583.

[71] [1947] A.C. 447.

[72] Ibid. 455.

"the moral social and physical well-being." There follows in each case a description of the class of persons to be benefited by the trusts, being a class of persons resident in the county boroughs of West Ham and Leyton. I agree with the other members of the court that the other relevant provisions of the two deeds only indicate the means to be used to attain the ends prescribed by the governing words. The main difficulty, which I have felt, is in reading the governing words conjunctively, notwithstanding the link provided by the word "and," particularly having regard to the judgment of Andrews C.J. in *Trustees of Londonderry Presbyterian Church House* v. *Commissioners of Inland Revenue*.[73]

In that case the Northern Ireland Court of Appeal reversed a decision of MacDermott J., who had to consider the following disposition of certain properties: "Upon trust to permit the same "or any part thereof to be used as a hall for meetings or for "social or recreation purposes in connection with the various "Presbyterian Churches in the City of Londonderry and the "surrounding district or as a hostel or boarding house or as a "library or for such other purpose or purposes as the Board of "Governors hereinafter defined or any Board of Governors or "committee to be substituted therefor in manner hereinafter "appearing shall from time to time think fit it being the true "intention and meaning of these presents that said premises "shall be used for the purposes of assisting and helping in the "religious moral social and recreative life of those connected "with the Presbyterian Church in the City of Londonderry and "surrounding district in such manner as the said Board of "Governors or substituted Board of Governors or committee "shall from time to time think right." MacDermott J. considered the various different uses to which the hall might be put as pointing to user for purposes which might be either religious or social or recreative in nature without being anything else, but came to the conclusion that, notwithstanding the words of disjunctive user, the words descriptive of the purposes of the trust could properly be read conjunctively in obedience to the guide provided by the word "and."

On appeal, Andrews C.J. took a different view on the construction of the words "religious moral social and recreative "life" in their context, and found difficulty in holding that every use to which the premises could legitimately be put must assist and help all the four purposes specified. He felt that the proper construction to place upon the terms of the trust, taken as a whole, was that the use of the hall for meetings might assist and help the religious and moral life of those intended to benefit, whilst its use for social and recreative purposes should satisfy their requirements in regard to social and recreative life. He added that both would be within the terms of the trust. He added, further, that he did not regard the question of construction as vital.

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[73] 27 T.C. 431.

A similar question of construction arises in this case, and counsel for the Crown has pressed upon us the difficulty of applying the adjectives contained in the governing words of these trusts conjunctively to the various activities which may legitimately take place upon the trust property.

While I agree with Harman J. that the *Londonderry* case[73] is a tax case of high persuasive authority, I have, however, finally come to the conclusion that, on the question of construction of the governing words of the deeds now under consideration, it is legitimate to give those words their ordinary grammatical interpretation and to read them conjunctively. In so far, therefore, as this opinion on construction is inconsistent with the reading of similar words in the *Londonderry* case,[73] I would respectfully prefer the construction adopted by MacDermott J. to that adopted by Andrews C.J., bearing in mind that, on this matter, the opinion of the latter was not vital to his decision. Once the difficulty of construction is out of the way, I am content to follow and adopt the reasoning of Jenkins L.J. throughout, and I feel free from any shackles which might appear to be imposed by the decision of the *Londonderry* case.[73] The objects first stated there were very wide, including, for example, "a hostel "or boarding house," objects which, prima facie, would not be charitable; and the words "it being the true intention and "meaning of these presents that said premises shall be used "for the purposes of assisting and helping in the religious "moral social and recreative life of those connected with the "Presbyterian Church in the City of Londonderry" can fairly be regarded as insufficient to make charitable what was not charitable before.

In this connexion, the words "assisting and helping" in the religious, moral and social life are less direct than the words "for the promotion of the religious social and physical well-

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[73] 27 T.C. 431.

"being" in the one deed, and the words "for the moral social "and physical well-being" in the other. This distinction, though a fine one, is, I think, in line with that adopted by the Privy Council in *Dunne* v. *Byrne*,[74] where it was held that a bequest "to the Roman Catholic Archbishop of Brisbane and his "successors to be used and expended wholly or in part as such "Archbishop may judge most conducive to the good of religion "in this diocese" was not a good charitable bequest, the language of the testator not being equivalent to "for religious purposes."

Accepting, therefore, the construction placed upon the deeds in question by Jenkins L.J., I have nothing further to add, except to say that I agree with his judgment and that of the Master of the Rolls. Accordingly, I would allow the appeals.

Appeals allowed.

Solicitors: *Kenneth Brown, Baker, Baker; Solicitor of Inland Revenue.*

B. A. B.

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[74] [1912] A.C. 407.

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Evershed M.R., Denning and Romer L.JJ.

In re CUNLIFFE-OWEN. MOUNTAIN *v.* INLAND REVENUE COMMISSIONERS.

[1952 C. No. 3566.]

Revenue—Legacy duty—Administration not completed before Finance Act, 1949, *in operation—Whether legacy duty chargeable—Finance Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 47), *s.* 27.

By section 27 (1) of the Finance Act, 1949, legacy duty shall not be chargeable, inter alia, "in connexion with any such event as is "mentioned in the next following subsection." In subsection (2) the events are defined as including "(*b*) the determination or failure "of any charge, estate, interest or trust; . . . (*e*) any other event "which, under the provisions of the relevant will or disposition or "the rules governing the distribution of the intestate's estate, affects "the right to the legacy . . . or to the enjoyment thereof or which "changes the nature of the property comprised therein or any part "of that property."

On February 3, 1948, probate was taken out of the will of a testator who had died on December 14, 1947. Half the residuary estate, which was of considerable size, went to a stranger in blood

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and legacy duty was accordingly payable on that half under the provisions of section 49 of the Finance Act, 1947, at the rate of 20 per cent. if the provisions of that Act applied. The testator's executors contended that, notwithstanding the fact that the testator had died before July 30, 1949, the date when section 27 of the Finance Act, 1949, came into operation abolishing legacy duty, that section operated to relieve them from all liability to pay legacy duty in respect of such part of the residuary estate as had not been distributed before July 30, 1949.

Upjohn J. held that legacy duty was payable. On appeal:—

Held, first, that the title of a residuary legatee to a residuary estate remains the same both before and after the completion of the administration, notwithstanding that it is not until it is complete that he can say that any particular asset is his and not merely part of the general estate of the testator.

Held, secondly, that when executors make a distribution of residue that is not "the determination . . . of any . . . estate" or "interest" within subsection (2) (*b*) of section 27.

Held, thirdly, that distribution was not an "event" which "under the . . . will" affected "the right to the legacy or . . . the "enjoyment thereof" or which changed "the nature of the property "comprised therein."

Legacy duty was accordingly payable.

The nature of the estate and interest of personal representatives in a deceased's estate considered.

In re Gibbs [1951] Ch. 933; [1951] 2 All E.R. 63, approved.

Cooper v. *Cooper* (1874) L.R. 7 H.L. 53; *Lord Sudeley* v. *Attorney-General* [1897] A.C. 11; 13 T.L.R. 38; *Barnardo's Homes* v. *Special Income Tax Commissioners* [1921] 2 A.C. 1; 37 T.L.R. 540; and *Corbett* v. *Inland Revenue Commissioners* [1938] 1 K.B. 567; 54 T.L.R. 279; [1937] 4 All E.R. 700, considered and explained.

Decision of Upjohn J. affirmed.

APPEAL from Upjohn J.

Sir Hugo Cunliffe-Owen died on December 14, 1947, and his will, dated November 22, 1947, was on February 3, 1948, proved by the executors, Sir Brian Edward Stanley Mountain and John William Sholto Comber. The testator left an estate of over £1,000,000. Under his will one-half of the residue went to a stranger in blood absolutely, and the other half was divisible between the testator's son and his two daughters. Having regard to the provisions of section 49 of the Finance Act, 1947, if legacy duty were payable, it was payable at the rate of 20 per cent. in respect of one half of the estate and at the rate of 2 per cent. in respect of the other half.

The executors had not completed the administration before

July 30, 1949, when section 27 of the Finance Act, 1949,[1] came into operation. By this summons, to which the Inland Revenue Commissioners were defendants, the executors asked whether, having regard to the provisions of section 27 of the Finance Act, 1949, legacy duty and succession duty were payable in respect of the personal and real estate comprised in the residuary estate of the testator which was distributed on or after July 30, 1949.

Upjohn J. held that legacy duty was payable, considering himself bound so to hold by the decision in *In re Gibbs.*[2]

The executors appealed. It was agreed between the executors and the Inland Revenue Commissioners that the appeal should be confined to a consideration of the question in relation to legacy duty.

J. Pennycuick Q.C. and *J. A. Wolfe* for the executors. This is, in effect, an appeal from the decision of Danckwerts J. in *In re Gibbs,*[2] by which Upjohn J. considered that he was bound. It is submitted that he was wrong in holding that section 27 (1) of the Finance Act, 1949, did not operate to exempt from legacy duty those parts of the testator's estate with regard to which the administration was completed on or after July 30, 1949, the date when that Act came into operation. Legacy and succession duty do not become payable until the administration is completed; until then, the legal estate in the testator's estate is in the executors and not in the beneficiaries. It is only on completion of the administration that the estate becomes transferable to the beneficiaries and the estate of the executors determines. During the period of administration the whole legal and beneficial interest in the deceased's estate is in the executors. The only right of the beneficiaries is to have the estate administered. There is a moment of time when the character of the executors' interest changes; that is when the legacies are paid or retained. It is at that moment that legacy duty first becomes payable: see Legacy Duty Act, 1796, s. 6.

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[1] Finance Act, 1949, s. 27 (1): "Legacy duty and succession duty "shall not be chargeable on a legacy "derived from a testator or intestate "dying after the commencement of "this Part of this Act [that is, July "30, 1949], or on a succession con-"ferred after that commencement, nor "on any other legacy or succession in "so far as the duty would apart from "this section be payable in connexion "with any such event as is mentioned "in the next following subsection."

Subs. (2): "The events referred to "in the foregoing subsection are any "of the following events happening "after the commencement of this Part "of this Act, that is to say—(*a*) the "death of any person; (*b*) the deter-"mination or failure of any charge, "estate, interest or trust; (*c*) the "exercise of a power of appointment; "(*d*) the making of any payment or "the application of any property, if "the duty would apart from this "section be chargeable; . . . (*e*) any "other event which, under the pro-"visions of the relevant will or dis-"position or the rules governing the "distribution of the intestate's estate, "affects the right to the legacy or suc-"cession or to the enjoyment thereof "or which changes the nature of the "property comprised therein or any "part of that property."

Subs. (3): "The reference in sub-"section (1) of this section to duty "being payable in connexion with an "event shall, in relation to legacy "duty, include its being payable "when the legacy is paid, delivered, "retained, satisfied or discharged in "connexion with that event, and for "the purposes of this section the "expression 'legacy' includes residue "and share of residue."

[2] [1951] Ch. 933; [1951] 2 All E.R. 63.

It is not possible to say that the executors have no interest in the estate before it is wound up. When the administration is completed that interest ceases and the beneficiaries become entitled in possession. The cesser of the executors' interest is an event within subsection (2) of section 27 falling under paragraph (*b*) as being " the determination or failure of any charge, " estate, interest or trust," and, accordingly, when the executors' interest determined on or after July 30, 1949, the exempting provisions of section 27 applied.

If the case does not fall within paragraph (*b*) of subsection (2), then it is submitted that paragraph (*e*) applies, since the determination of the administration " affects the right to the legacy " " or to the enjoyment thereof," or it " changes the nature of the " property comprised therein." It is difficult to imagine any event which " affects " a legatee more than the payment of his legacy. Subsection (3) by the use of the word " include " shows that it is not intended to limit the events to those there enumerated.

It is clear from *Lord Sudeley* v. *Attorney-General,*[3] *Dr. Barnardo's Homes* v. *Special Income Tax Commissioners*[4] and *Corbett* v. *Inland Revenue Commissioners*[5] that until the administration is completed the beneficiaries have no equitable interest in any part of the testator's estate. The executors are the legal owners and no one else is the equitable owner. It is not possible to say that the cesser of the interest of the executors is not the determination of an interest within paragraph (*b*), or, if that is not accepted, that there has not been a change in the nature of the property comprising the beneficiaries' interest within paragraph (*e*). Accordingly, section 27 applies to grant exemption from legacy duty.

[3] [1897] A.C. 11; 13 T.L.R. 38.

[4] [1921] 2 A.C. 1; 37 T.L.R. 540.

[5] [1938] 1 K.B. 567; 54 T.L.R. 279; [1937] 4 All E.R. 700.

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J. A. Wolfe following. On the death of a testator the whole of his estate vests in his executors. They do not hold any particular item of property on trust for any particular beneficiary. It is when the administration is completed that the interest of the executors determines within paragraph (*b*), and then the nature of the beneficiaries' interests also changes and they become entitled to specific items of property. It is conceded that before the administration is completed the beneficiaries have some kind of interest in the deceased's estate, but it is an inchoate interest which becomes a specific interest only when the administration is completed. This is an event which affects their right within paragraph (*e*).

Sir Reginald Manningham-Buller Q.C., S.-G. and *J. H. Stamp* for the Inland Revenue Commissioners. Section 27 (2) of the Finance Act, 1949, is in similar terms to section 49 of the Finance Act, 1947. If the executors are right and the date of the close of administration determines the liability to legacy duty, it follows that in the case of testators who died before the Act of 1947 came into operation, but the administration of whose estates was not then completed, legacy duty at the higher rate imposed by that Act would be payable. It appears from the language of both Acts that the events on which duty is to be paid or not paid are events affecting beneficial interests and not events depending upon administrative acts. The right of a legatee to a legacy or share of residue arises on the testator's death, just as the right of the next-of-kin arises on the deceased's death. The right does not come to fruition until the administration is completed: *Cooper* v. *Cooper.*[6] The decisions in the *Sudeley,*[7] *Barnardo*[8] and *Corbett*[9] cases are of little assistance here.

Secondly, the right of the legatees is not changed on completion of the administration. The right is analogous to the right of a creditor to payment of a future debt at a future time: *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners.*[10] Even as the right of the legatee arises on the death, so does the right of the Crown to payment of legacy duty. It then becomes chargeable: *per* Lord Fleming in *Lord Advocate* v. *Wotherspoon's Trustees.*[11] [Reference was made to section 6 of the Legacy Duty Act, 1796.]

In considering whether this is an event within paragraph (*e*) the ejusdem generis rule should be applied. Paragraphs (*a*), (*b*),

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[6] (1874) L.R. 7 H.L. 53.

[7] [1897] A.C. 11.

[8] [1921] 2 A.C. 1.

[9] [1938] 1 K.B. 567.

[10] [1953] A.C. 347; [1953] 1 All E.R. 403.

[11] 1930 Sc.L.T. 82, 84.

(*c*) and (*d*) of subsection (2) are all concerned with vesting of beneficial rights, and paragraph (*e*) should be construed as limited to events affecting beneficial rights. The decision of Danckwerts J. in *In re Gibbs* [12] was right.

J. H. Stamp following. It is desirable to look more closely at what is meant by ascertaining the residue. That is an act which does not depend on the trusts of the will. It is an act in the law. The assent by the executor to the vesting of the beneficial interests is independent of the will. Parliament cannot have meant that rights should depend on an administrative act: *George Attenborough & Son* v. *Solomon.* [13] The ascertainment of the residue does not change the nature of the property; the executors merely recognize that they can dispose of part of it in accordance with the trusts of the will: *Inland Revenue Commissioners* v. *Smith.* [14]

Pennycuick Q.C. in reply. The executors have, until assent, plenum dominium over all the assets. By assenting they deprive themselves of that plenum dominium and the enjoyment of the beneficiary begins and the legacy becomes payable. It is then that legacy duty becomes payable, and, if that happens after the Act of 1949 comes into operation, section 27 relieves the legatee of the obligation to pay legacy duty. This appeal should be allowed.

EVERSHED M.R. stated the facts, read section 27 of the Finance Act, 1949, and continued:—Put in a sentence, the claim of the appellant executors in this case is that they are exempt from the liability to pay legacy duty in respect of all residue distributed since July 30, 1949, and in respect of that which remains to be distributed henceforth, by virtue of the language of section 27 of the Finance Act, 1949, and in particular by virtue of the provisions of subsection (2) (*b*) and (*e*) thereof. It is said (and this is the main premise upon which the case for the executors rests) that pending final administration, or pending some interim distribution, a residuary legatee has—and I am using Mr. Pennycuick's language—only an expectancy in the eye of the law, that is to say, a right at most to receive in the future whatever may be found available when provision has been made for debts and other obligations or when such debts and other obligations have been satisfied, and that it is only upon the occasion of an actual distribution or, alternatively, when administration

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[12] [1951] Ch. 933.

[13] [1913] A.C. 76.

[14] [1930] 1 K.B. 713.

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is complete, that the interest of the residuary legatee ripens into or becomes a possessory interest. Only then does he become entitled to enjoy (in part or wholly) the subject-matter of his legacy. It therefore follows, they say, that, when a distribution is made, an interest or estate, which previously existed in the executors, "determines" within the meaning of subsection (2) (*b*). Alternatively, it is said that on an assent to a partial distribution, or upon the final winding-up of the estate, an "event" occurs under paragraph (*e*) which, under the provisions of the will of this testator, either affects the right of the residuary legatee to the legacy or to the enjoyment of the legacy or which changes the nature of the property of which the legacy consists. It follows, therefore, they say, that if the determination or the event, as the case may be, occurs after July 30, 1949, exemption from legacy duty in respect of what is distributed takes effect by virtue of section 27.

The premise which I have tried to state depends very largely upon certain expressions used in the House of Lords in such cases as *Lord Sudeley* v. *Attorney-General* [1] and *Dr. Barnardo's Homes* v. *Special Income Tax Commissioners*,[2] and also upon expressions of Sir Wilfrid Greene M.R. in *Corbett* v. *Inland Revenue Commissioners*.[3] The problem presented must, in the end, turn on the construction, according to their ordinary sense, of the words which have been used in this particular section. No one who has attended to the argument presented to this court will, I imagine, be willing to say that the problem is other than difficult.

The Solicitor-General, for the Crown, drew attention to the fact that this is not the first use of the relevant language by Parliament. By the Finance Act, 1947, legacy duty was doubled; and section 49 of that Act, in achieving that process of duplication, used exactly the same language in subsection (3) as Parliament used again, when it sought to put an end to legacy duty, in subsection (2) of section 27 of the Finance Act, 1949. It spoke, that is to say, in 1947, of "events" in connexion with which legacy duty was payable, and it specified the same series of events as is specified in subsection (2) of the section now under review. Since both Acts relate to the same subject-matter, namely, legacy duty, it is, I assume, legitimate for the court, in trying to solve the problem of construction, to pay regard, if it is

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[1] [1897] A.C. 11; 13 T.L.R. 38.

[2] [1921] 2 A.C. 1; 37 T.L.R. 540.

[3] [1938] 1 K.B. 567; 54 T.L.R. 279; [1937] 4 All E.R. 700.

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of assistance, to the earlier expression of Parliamentary intention. The Solicitor-General made the point that, if the argument presented in this court is correct, it would follow (and I think that Mr. Pennycuick did not shrink from this result) that the question whether in any particular case legacy duty at double the previous rate would be payable would, or might, depend upon the exact date when executors chose to assent to a legacy or when they had completed the administration of their estate.

It was said that it would be a surprising result that the amount of duty should depend upon an accidental circumstance of that kind, or if "accidental circumstance" be not an entirely correct phrase, upon a matter so much in the discretion of the executors in the performance of their administrative duties. Still, the question is, what has been said by Parliament and what is the effect of the language they have used? I say no more, therefore, upon the earlier Act than this (and what may be said about that Act equally may be said about this Act), that to my mind, at first sight, it is remarkable that (if the executors are right) the incidence of double duty in the one case, and exemption in the other, should depend upon events of the character which I have mentioned, namely, the decision of executors to make a partial or final distribution or upon their having completed the process of administration which, as everybody knows, may be prolonged for good or other reasons over a great length of time. The problem, none the less, is a question what is the sensible meaning of the language used.

When the matter came before Upjohn J. he regarded himself as bound by an earlier decision in *In re Gibbs*,[4] in which Danckwerts J. construed the relevant provisions of this section in a sense which was fatal to the subject in that case.

I have come to the conclusion—and I state my conclusion immediately—that Danckwerts J.'s decision in *In re Gibbs*[4] was correct, and that he had rightly construed the relevant provisions of this somewhat difficult section. But it is plainly due to the careful arguments to which we have attended that I should state my own reasons for that conclusion, though I am, in large measure, content to adopt the language used by Danckwerts J. in *In re Gibbs*.[4] But first I must say something about *Lord Sudeley* v. *Attorney-General*,[5] *Dr. Barnardo's Homes* v. *Special Income Tax Commissioners*,[6] and *Corbett* v. *Inland Revenue*

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[4] [1951] Ch. 933; [1951] 2 All E.R. 63.

[5] [1897] A.C. 11.

[6] [1921] 2 A.C. 1.

Commissioners,[7] which largely form the basis of the arguments which the executors have put forward.

In the *Sudeley* case[8] the question was whether a legatee, who was entitled to a share of a testator's residuary estate and who had died before the completion of the administration of the estate, was to be treated as having acquired an interest as residuary legatee in certain specific assets of the testator's estate which were situate in New Zealand (for, if so, those assets would not be subject to English duty on the legatee's death), or whether the residuary legatee must be treated as having an interest generally in the estate of the testator, which was being wound up in England, and in respect of which, as an English asset, duty would be leviable in this country. The House of Lords decided in favour of the latter view. In the course of his reasons Lord Herschell (to take his speech as an example) pointed out that administration not being complete, the legatee had[9] no "estate, "right, or interest, legal or equitable," in the specific New Zealand real property.

In *Dr. Barnardo's* case[10] a similar view was the basis of the decision that sums paid on account (pending the completion of the administration) to the charity, Dr. Barnardo's Homes, which consisted in fact of income from which tax had been deducted, could not be treated as being, or as having been, the income of the charity, so as to enable the charity to claim a return of the income tax as having been paid on the charity's behalf. Again (and I need not refer to the precise language of the speeches, particularly that of Lord Finlay,[11] which was later quoted in the *Corbett* case[12]), the decision rested upon the view that the legatee, Dr. Barnardo's Homes, could not, in the circumstances, say that they were entitled to any of the items of property out of which their legacy was ultimately payable. Those two cases, as it seems to me, taken by themselves, do not carry the executors the distance which they seek to be carried. It is one thing to say that, pending final administration, a residuary legatee is not entitled to any estate, right, or interest, whether legal or equitable, in any specific item of property; but it is another thing to say (and it does not follow from the first proposition, in my opinion) that pending administration the residuary legatee has no interest in the estate at all or is enjoying a mere expectancy.

In the case in this court of *Corbett* v. *Inland Revenue*

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[7] [1938] 1 K.B. 567.
[8] [1897] A.C. 11.
[9] Ibid. 18.
[10] [1921] 2 A.C. 1.
[11] Ibid. 6.
[12] [1938] 1 K.B. 567.

Commissioners [12] there is certain language which, read apart from its context, might appear to go somewhat further. Before therefore, I refer to it, I draw attention to cases such as *Cooper* v. *Cooper*,[13] to which the Solicitor-General referred. For that case seems to me to refute the second proposition which is said, as I venture to think erroneously, to flow from the cases of *Lord Sudeley* [14] and *Dr. Barnardo's Homes*,[15] namely, the proposition that pending final administration and distribution the residuary legatee has no title or interest at all in residue. And if it is thought that cases such as *Lord Sudeley* [16] and *Dr. Barnardo's Homes* [17] are not easily reconcilable with *Cooper's* case [18] (which was not, in fact, cited in *Lord Sudeley's* case [19]), the solution, as it seems to me, can be found in the language which Younger J. used in *Vanneck* v. *Benham*.[20] Younger J. there used language which I respectfully adopt and to which, indeed, I do not desire to add anything of my own. After saying that it was unfortunate that *Cooper* v. *Cooper* [21] was not cited in *Lord Sudeley* v. *Attorney-General*,[22] and also that *Lord Sudeley's* case [22] was not cited in another case, he goes on [23]: "But I think it is not difficult to arrive at "the true distinction between the two lines of authority which "at first sight may seem to be in conflict. The distinction, it "appears to me, is that an interest in an intestate's estate is "sufficiently specific to raise a case of election"—which was the *Cooper* case [21]—"representing as that interest does all the "money's worth of the property comprised therein, but that such "interest is not sufficiently specific, apart from agreement with "the next of kin where there are more than one, to enable any "one of the next of kin to say to the administrator 'This or that "'thing is mine. Hand it over to me.'"

Having made that reference, I refer to *Corbett* v. *Inland Revenue Commissioners*.[24] Sir Wilfrid Greene M.R. had referred to what had been said in the *Barnardo* case,[25] and went on [26]: "It is quite obvious from that observation that in the view at "any rate of Lord Buckmaster the principle underlying the "*Barnardo* case [27] was not a limited principle turning entirely

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[12] [1938] 1 K.B. 567.
[13] (1874) L.R. 7 H.L. 53.
[14] [1897] A.C. 11.
[15] [1921] 2 A.C. 1.
[16] [1897] A.C. 11.
[17] [1921] 2 A.C. 1.
[18] L.R. 7 H.L. 53.
[19] [1897] A.C. 11.
[20] [1917] 1 Ch. 60.
[21] L.R. 7 H.L. 53.
[22] [1897] A.C. 11.
[23] [1917] 1 Ch. 60, 76.
[24] [1938] 1 K.B. 567.
[25] [1921] 2 A.C. 1.
[26] [1938] 1 K.B. 567, 575.
[27] [1921] 2 A.C. 1.

"on the precise language of the provisions of the Income Tax "Act relating to the exemption of charities. He read it, as I "read it, as deciding the case of the charity concerned upon the "larger principle that, until the residue is ascertained in the due "course of administration, the beneficiaries have no title to that "residue." If the judge had said "have no title to residue" instead of "to that residue," I think that Mr. Pennycuick might well have fastened upon such language as supporting the underlying principle upon which he sought to rely. But I think that in its context Sir Wilfrid Greene M.R. meant no more than this, as was indeed pointed out in the *Lord Sudeley* case,[28] that, until residue had been finally ascertained, the beneficiaries could not say, as respects any or all of the items which eventually made it up, "This or that is mine. Hand it to me." Later Sir Wilfrid Greene M.R. said [29]: "But, in the case of executors, it is not "true to say (and this is how I read the opinion of Lord Finlay)" —that is, in the *Barnardo* case [30]—"that the income when "received by executors pending the conclusion of the administration is the income of the beneficiaries in that sense." Again, I think that the last three words make clear that the Master of the Rolls was not seeking to go at all beyond what had been laid down in the two House of Lords cases.

In my judgment, the same observation may again be made with regard to the passage where Sir Wilfrid Greene M.R. came to his conclusion on the effect of the rule in *Allhusen* v. *Whittell*,[31] and he used the phrase [32]: "In my opinion, the existence of the "rule in *Allhusen* v. *Whittell* [33] cannot alter the fundamental "fact that, during the period of administration, the income is the "executor's income and nobody else's. As Lord Atkinson said, "and as had been pointed out by Lord Sterndale and Atkin L.J. "(as he then was) in the Court of Appeal, the residue does not "exist until the estate is cleared." I cannot, therefore, accept the proposition that either on the authority of the cases referred to or otherwise, pending final administration, or pending a partial distribution, the residuary legatee has no interest in residue beyond what Mr. Pennycuick has called a mere expectancy. I think his title to the residue is there from the start and, indeed, the *Lord Sudeley* case [34] shows that, if he should die before he actually comes into possession of it, his estate will be liable to

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[28] [1897] A.C. 11.
[29] [1938] 1 K.B. 567, 577.
[30] [1921] 2 A.C. 1.
[31] (1867) L.R. 4 Eq. 295.
[32] [1938] 1 K.B. 567, 581.
[33] L.R. 4 Eq. 295.
[34] [1897] A.C. 11.

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pay duty upon the value of that interest in residue ascertained as best may be in the circumstances. The effect undoubtedly of the conclusion of administration or of a partial distribution is to enable the legatee to say, and to say for the first time as regards the subject-matter distributed, " This particular property is now mine."

With that introduction, and having stated what I believe to be the limits of the proposition for which *Lord Sudeley's* case[34] and *Dr. Barnado's* case[35] are authorities, I turn to consider the argument which turns upon paragraphs (*b*) and (*e*) of subsection (2) of section 27 of the Act of 1949. I take first (*b*). Can it be said that when a partial distribution or a final distribution is made, then there is within the meaning of this subsection the " determination " of an estate or interest? In his opening speech, Mr. Pennycuick put his emphasis on the submission that since, quoad the subject-matter distributed, the beneficiary had, pending the distribution, no beneficial interest in it, there therefore must be inferred, and there must exist, an equitable interest in the subject-matter so distributed, which equitable interest belonged to the executors until the moment of distribution but then determined.

Now I think that, in approaching the construction of this subsection, it is legitimate to note that the various instances given seem to me, at any rate, prima facie, to be referable to beneficial interests of some kind or another. After all, the subsection is dealing with events in connexion with which legacy duty is or would, but for the section, be payable; and legacy duty is payable (putting it quite broadly) when the legatee gets his legacy. The phrase " determination or failure of an estate or " interest " is one commonly met with in conveyances and documents of that kind and would, prima facie, be treated as appropriate to beneficial interests of some sort or another. It seems to me, I confess, as a matter of language, that even if an equitable estate in the executors does come to an end on the happening of the event in question, it would be an inappropriate use of language to speak of that event as " determining " such an interest in the executors. But I do not think it right to regard the estate of an executor, pending distribution, as having some equitable quality as well as, but distinct from, the legal estate which undoubtedly is vested in the executors. I do not think it right to suppose that every piece of property must have in it the double characteristic of a legal and an equitable estate. The equitable estate in the sense of a proprietary interest which exists, and is treated in these courts as existing in many species of property, is, in many cases, no more than the consequence of the circumstance that the person entitled to it has during the development of our equity been treated as entitled to particular equitable remedies. And it is obvious, in any event, that the executors have no beneficial interest. Their duty is to apply the assets in their hands in due course of administration. I do not therefore accept the view that there is any "equitable interest" in the executors, which can be fairly said to determine when they hand over any part of the residue.

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[34] [1897] A.C. 11.

[35] [1921] 2 A.C. 1.

In the course of his reply, Mr. Pennycuick fastened upon something which had been said on the other side, and contended that what determined was that which was called in *Attenborough* v. *Solomon* [36] in the House of Lords the "plenum "dominium" of the executors. Pending distribution, all the items making up the estate are, no doubt, in the "plenum "dominium" of the executors. They have a good title, for example, to charge them for the purpose of raising money. When they hand any asset over to the legatee, it is obvious that the "dominium" then comes to an end. Equally, the "plenum "dominium" would come to an end if they paid a creditor, so far as the subject-matter handed over is concerned. But, as a matter of the language used, and without attempting to expound the matter any further, it seems to me that subsection (2) (*b*), in speaking of the "determination of an estate or interest," is not directed to, and is not fairly descriptive of, that which happens when an executor parts with assets which were formerly in his hands by handing them over in the course of partial distribution or otherwise to a residuary legatee. I accordingly (construing the paragraph, as I have tried to do, according to its ordinary significance) reject the argument that upon payment to a residuary legatee there can be fairly said to occur a "determination of any estate or interest."

There remains, however, paragraph (*e*), which has seemed to me to present a more difficult problem; and so, I gather, Danckwerts J. also thought. I will read it again in order to state what is the argument upon paragraph (*e*): "Any other event "which, under the provisions of the relevant will . . . affects the

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[36] [1913] A.C. 76; 29 T.L.R. 79.

"right to the legacy . . . or to the enjoyment thereof or which "changes the nature of the property comprised therein." Again, I think (though Mr. Pennycuick will not, I hope, regard me as saying this in any critical sense) that the argument of the executors somewhat shifted its emphasis in reply from what it had been when opened; for the emphasis put by Mr. Pennycuick in opening was rather upon the final completion of administration as constituting the "event" within the meaning of the paragraph. In reply, he was content to take as the "event" the assent by the executor to the vesting in the legatee in possession of the whole or any part of the subject-matter of his legacy—a shifting of emphasis which may have been due in no small measure to an argument put forward by Mr. Stamp.

In approaching this question, without desiring to lay it down that the "other event" must be necessarily ejusdem generis with (*a*), (*b*), (*c*) and (*d*), still as a first impression created on my mind by the subsection, I should not expect to find that the "event" in paragraph (*e*) is a purely administrative act. But whatever the event is, it must (according to the paragraph) be an event which, under the provisions of the will, has a certain effect. Now Mr. Stamp pointed out that an assent by an executor is something which may be, and in strictness frequently is, altogether unrelated to any direction which the will may contain. Whatever the will may say, the executor has a duty to administer the estate, pay the creditors, and so forth; and he may decide at any point of time to assent to any part of any legatee's legacy being handed over to that legatee. He may do so, if he wishes, without having the assets or any single asset sold, notwithstanding the most comprehensive trusts for sale which he may find in the will.

The point is made clear by Lord Haldane L.C. in his speech in *Attenborough* v. *Solomon*.[36] The question in that case was whether the executor of the will there in question was still acting in that capacity when he pledged certain property of his testator. If Mr. Solomon was still an executor, then his right to pledge was unquestioned. If, however, he had ceased to be an executor, and had become a trustee, then no less plainly he had no right whatever to pledge the particular asset. The transaction in question took place some fourteen years after the testator's death; but it was argued that, since sometimes administration continues for a very long period of time, the court ought to treat

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[36] [1913] A.C. 76; 29 T.L.R. 79.

Mr. Solomon as being still an executor when he made the particular pledge. It was in connexion with that submission that Lord Haldane L.C. said[37]: "The meaning of a residuary "account must of course be construed with reference to its "purpose. It is not a document which is intended to have the "operation of a declaration of trust; but it may be looked at as "against the executor as evidence of what he regarded as being "the position of the estate. I think it is plain from that document that Mr. J. D. Solomon regarded the debts as having "been all paid and the estate as ready to be held upon the "trusts of the will which affected it in the hands of the "trustees." Then later he said[38]: "The general principles of "law which govern this case are not doubtful. The position of "an executor is a peculiar one. He is appointed by the will, but "then, by virtue of his office, by the operation of law and not "under the bequest in the will, he takes a title to the personal "property of the testator, which vests him with the plenum "dominium over the testator's chattels. He takes that, I say, "by virtue of his office. The will becomes operative so far as "its dispositions of personalty are concerned only if and when "the executor assents to those dispositions."

As Lord Haldane L.C. observed, the question whether an assent has taken place, whether there has been full administration, is a question of fact depending upon the executors' determination, and may often be a matter of fact not at all easy to ascertain or determine with precision. If that is so, it lends some colour, at any rate, to the view which I take that paragraph (*e*) is not likely to be referring to an event so uncertain and difficult of precise definition.

The question is, having particular regard to the language used by Lord Haldane L.C., can it be said that an assent is an "event" under the provisions of the will within the meaning of paragraph (*e*)? In a sense, it can no doubt be said, as Mr. Pennycuick said in this case, that the executors were carrying out the directions of the will. Still, I think that Mr. Stamp's point is well founded. The assent really is something which depends for its validity and effect not upon the provisions of the will but upon the executor's own volition in the conduct by him of his duties of administration according to the general law. But further, I am also of opinion that the assent or the final administration, whichever event is regarded, cannot strictly be said to

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[37] [1913] A.C. 76, 81.

[38] Ibid. 82.

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"affect the right to the legacy or to the enjoyment thereof." I do not, of course, forget that, upon the assent taking effect, the legatee for the first time is entitled to say, as regards the property distributed, "This now is mine." From that point of time he enjoys possession of that property. But still, according to the language used, it seems to me that what is here spoken of is an event which affects something which was already pre-existing. I have already said that, as a matter of law, I think that the right to the legacy previously existed and existed from the testator's death. The actual or physical enjoyment may spring up from the moment of the distribution; but then, if it did not exist before, the event in question cannot fairly be said to have "affected" it.

Finally, it was said that the "event" of distribution or the final winding up "changed the nature of the property comprised" therein. I also reject that argument. Those words, in my judgment, refer to something which changes the nature of the property, as distinct from the interest in it. For example, in the case of heirlooms, if a sale takes place, then the nature of the subject-matter of the legacy changes, and that is a circumstance very relevant to the liability to pay duty. But, in a case such as the present, the nature of the property distributed is, in point of fact, identical immediately before and immediately after the assent. The assent itself does not affect the nature of the property which is the subject of the distribution.

For these reasons I reject all the arguments based on paragraph (*e*). But I think that further force is added to the contrary contention by the third subsection; and, as regards the effect of that subsection, I am, for my part, content to adopt what was said by Danckwerts J. in *In re Gibbs.*[39] I would also like to adopt (because it is, in my judgment, correct) what the judge said on the more general question. Danckwerts J. said[40]: ". . . that there must be read into the will all that the law "would apply or imply, apart from that which is set out "expressly in the will, it seems to me that the title of the "residuary legatee to a residuary estate remains the same both "before and after the completion of administration, notwith-"standing that it is not until it is complete that he can say that "any particular asset or any particular income is his, and not "merely part of the general estate of the testator." In my judgment, that is a correct summary of the conclusion upon the general argument.

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[39] [1951] Ch. 933, 940.

[40] Ibid. 940.

The judge then went on to deal with subsection (3). " Sub-" section (3), which refers back not to subsection (2), which " deals with the events, but to subsection (1), seems to show that " the argument put forward by Mr. Upjohn that the administrative " act was not an event within the meaning of the subsection is " plainly right. It would have been so easy for the legislature, " if they had so intended, to say that the reference to duty being " payable in connexion with an event shall be a reference to " duty being payable in connexion with the payment, delivery, " retainer, satisfaction or discharge of the legacy. That would " have brought in the rules about payment in the sections of the " Legacy Duty Act, 1796. That, however, is not what the sub-" section provides. The subsection refers to the duty's being " payable in connexion with the event. Then, when it deals " with delivery and retainer, the words are, ' shall, in relation to " ' legacy duty, include its being payable when the legacy is " ' paid, delivered, retained, satisfied or discharged in connexion " ' with that event.' In other words, the event is something " different from the delivery, retainer, satisfaction, discharge or " payment." I adopt that part of the judge's argument, which seems to me somewhat strongly to support the view that an assent or a retainer (which is, in effect, the same thing) is not an event within the contemplation of paragraph (*e*).

A point was taken during the argument in connexion with subsection (3). Mr. Pennycuick noted that the word used is " include " and not " means." I agree that according to the ordinary sense of the language " include " is a word of expansion. It is, I also agree, difficult to think of any case in which legacy duty might be payable strictly " in connexion with " one of the events stated in subsection (2), without recourse to the exposition in subsection (3). My answer is that the word " include " may well have been used ex abundanti cautela—and in any revenue statute I think caution may be easily justified. I hope that I shall be forgiven for not mentioning other points in detail, but as regards paragraph (*e*), I should add that in my judgment no help can be got from the phrase " the rules governing the " distribution of the intestate's estate "; for in my judgment those words refer to Part IV of the Administration of Estates Act, 1925, and do not, therefore, serve to introduce the language of Part III, which contains the purely administrative matters provided for in that Act. If those administrative events were introduced, it might no doubt assist the executors to say that the " event " stated in paragraph (*e*) might, at any rate, include a purely administrative event. However, in my judgment, the rules referred to are rules for the beneficial devolution of an intestate's estate, which are to be found in Part IV of the Act of 1925.

For the reasons which I have stated, I think that Danckwerts J.'s judgment in *In re Gibbs*[41] was correct, and that Upjohn J. was, therefore, right in dismissing the present action.

DENNING L.J. I agree. Stripped of all trimmings, the executors' argument came to this, that on any legacy paid after the Act of 1949 no legacy duty is payable. As a corollary, it was admitted that on any legacy paid after the Act of 1947 and before the Act of 1949 double duty was payable. All I would say is that, if that was the intention of the legislature, there would be nothing easier than to say it, and they have not said it. Apart from that, it would be most capricious to give such an operation to the Act, because it would mean that the incidence of duty would depend on the expedition or the dilatoriness of the executors.

The particular provisions which Mr. Pennycuick relied on were, first, sub-paragraph (*b*) of subsection (2) of section 27. When Mr. Pennycuick opened the case he asserted that, until the executors had administered the testator's estate, they had the entire legal and equitable interest in the property comprised in it; and that when they completed the administration and became trustees, then there was a " determination or failure " of their equitable interest and, therefore, an event within section 27 (2) (*b*). He relied on *Lord Sudeley* v. *Attorney-General*.[42] I entirely dissent from that proposition. An executor has, of course, the legal interest in the property, but he has not the equitable or beneficial interest. Subject to the payment of duties, the legatees have the beneficial interest in it, and they have that interest from the date of the death. When the estate is administered the interest remains intact; it does not fail or determine.

Secondly, Mr. Pennycuick relied on sub-paragraph (*e*). He said that when the executors gave their assent to a legacy, that assent " affected the right to the legacy or to the enjoyment " thereof " and, therefore, was an event within the sub-paragraph. As to that, I would say that the right of a legatee to his legacy, whether specific or residuary, arises on the death, but it can be

[41] [1951] Ch. 933.

[42] [1897] A.C. 11.

only asserted by calling on the executor to do his duty (*Cooper* v. *Cooper* [43]). The assent by the executor does not affect the nature of the right, or even the enjoyment of it; it only links the right to specific property. It is merely the occasion when the right is realized. This distinction—between the right itself and the realization of it—is a distinction well known to the law. It is repeatedly taken in the cases where a debt is said to be debitum in presenti solvendum in futuro, and is illustrated by *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [44] in the House of Lords. It seems to me that on this question of "affecting enjoyment thereof," the answer is that the assent may affect the enjoyment of the property comprised in the right, but it does not affect the enjoyment of the right itself. For these reasons I entirely agree with the judgment which my Lord has proposed.

ROMER L.J. I also agree, and have very little to add. In the course of his opening, Mr. Pennycuick suggested, as I understood it, that there is always some equitable element or interest attaching to the ownership of property. I cannot accept that. It is true that there are certain interests in property which were the creation of the Courts of Equity and certain remedies which the Courts of Equity evolved. But to say that there is always an element of equitable title in the ownership of property is, in my opinion, unsound. Starting from that premise, it was then suggested that an executor, during the period of administration, not only has the legal interest in the assets, but has some kind of equitable interest (not amounting to a beneficial interest) which the court would cease to recognize when the estate is cleared. For my part, I cannot see of what that interest can be said to consist. If there is such an interest, presumably it would be capable of definition, and no satisfactory explanation either of its nature or of its quality was forthcoming in the course of the argument. In my opinion, the executors have no equitable interest during the period of administration in the manner that was suggested.

As an alternative way of putting it, it was said that every time the executor assents to a pecuniary legacy or to the payment or retention of a share of the residue, there is pro tanto a determination or failure of the executors' estate or interest in the assets. If that be so, there would be a succession or series of determinations or failures of that character as the executor

[43] L.R. 7 H.L. 53.

[44] [1953] A.C. 347; [1953] 1 All E.R. 403.

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paid the debts and legacies. I am quite satisfied that that was very far removed from the conception which the legislature had in its mind in enacting section 27 (2) (*b*). The language there, "the determination or failure of any charge, estate, interest or "trust," is well-known language signifying a reference to beneficial interests as, indeed, in my opinion, is the language of (*a*), (*c*) and (*d*) as well. It is my view that all these specific events enumerated there are referable to beneficial interests and are not in the least directed to mere acts of administration.

I think myself that (*e*), which starts off with the words "any "other event," in itself casts some light on (*a*), (*b*), (*c*) and (*d*), and that they themselves cast some light on (*e*). Danckwerts J. rather applied the ejusdem construction to (*e*), having regard to the opening words, which I have mentioned, "any other event," and I think that he was right. Apart from that phrase, which would tend to bring forward into (*e*) the beneficial elements which are derived from (*a*) to (*d*), one then finds in (*e*) a reference to "rules governing the distribution of the intestate's "estate." It seems to me to be reasonably plain, as my Lord has indicated in his judgment, that that is a reference to Part IV of the Administration of Estates Act, 1925, which is entitled "Distribution of Residuary Estate," which means the residuary estates of intestates and is not referable to Part III, which is entitled "Administration of Assets." The word "rules" is a curious word to use, but it seems to me to be quite in conformity with the view that it is a reference to Part IV and does not bring in the totality of the Administration of Estates Act, 1925, provisions which relate to administration and distribution generally. Had it referred generally to the provisions as to intestates' estates, it might have been more adapted to that purpose.

So I think myself that taking (*a*), (*b*), (*c*) and (*d*), both by themselves and also in conjunction with (*e*), the conclusion is that the events in all of these subsidiary provisions are referable and referable alone to events of a beneficial character. If that be so, it is enough to dispose of the suggestion that an assent is an event within the meaning of (*e*), because that is merely an act of administration. But apart from that, the point, which I think is quite decisive against the executors on (*e*), is that the event must be one which is an event under the provisions of the will. For the reasons to which Mr. Stamp referred (supported as they are by what Lord Haldane L.C. said in the *Attenborough* case [45]

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[45] [1913] A.C. 76.

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and the further observations of this court in *Inland Revenue Commissioners* v. *Smith*[46]), it appears to me to be virtually impossible to say that an assent by executors is a provision under the will. It is nothing of the kind. It is an administrative act imposed by the law on executors, which they are bound to perform regardless of anything in the will contained and which is so far removed from being a provision of the will that none of the beneficial provisions of the will come into operation at all until the assent has been given. Therefore, if it is said that the assent is a provision under the will which affects the right to the legacy one looks to the will, and one looks in vain, to find a provision there which could be regarded as having the result for which the executors contend. I think that that point is decisive on (*e*) and I say no more about it.

In conclusion, I would like to associate myself with what my Lord said and to express my complete concurrence with the passage in the judgment of Danckwerts J. in *In re Gibbs*,[47] where he said: "It seems to me that the title of the residuary "legatee to a residuary estate remains the same both before and "after the completion of administration, notwithstanding that it "is not until it is complete that he can say that any particular "asset or any particular income is his, and not merely part of "the general estate of the testator." If I may respectfully say so, that appears to me to be a lucid and entirely accurate statement of the law in that respect.

I agree that the appeal fails.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *W. Gordon Hill; Solicitor of Inland Revenue.*

B. A. B.

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[46] [1930] 1 K.B. 713.

[47] [1951] Ch. 933, 940.

1953
May 5, 6, 21.

Upjohn J.

STOKES *v.* BENNETT (INSPECTOR OF TAXES).

Revenue—Income tax—Maintenance order by Divorce Division—Payments free of tax—Husband resident abroad—No evidence that tax deducted from payments — Wife not liable to deduction of tax — Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19, 21.

The appellant obtained an order for the dissolution of her marriage in 1938, and on February 1, 1938, the Divorce Division made an order that she should receive £22 a month free of tax. In 1946 the husband went to live abroad; he remitted payments to the appellant by banker's order. There was no evidence that the payments had been subjected to British income tax, or that he possessed a source of income subject to British income tax. The wife was assessed to tax under Case III of Sch. D on the maintenance payments on the ground that they were untaxed income in her hands, and that no inference could be drawn that they had suffered deduction of tax. The wife appealed from those assessments:—

Held, (1) that as the husband had made, more or less exactly, payments of the net sums prescribed by the order, the only permissible inference to be drawn was that he intended to and did deduct tax from the gross amounts payable to the appellant; and, on the footing that he was resident in the United Kingdom, those sums so far as the appellant was concerned must be treated as sums which had borne tax and no further assessments could be raised on her in respect of them.

(2) That the husband, notwithstanding his continued residence outside the United Kingdom, remained liable to account to the Crown for the tax, since he had withheld tax solely in reliance on an Imperial statute and, although the Crown might not be able to recover it in a foreign court, he could, notwithstanding his foreign residence, be assessed directly in respect of it; and the Crown's claim against the appellant, therefore, failed.

Allchin v. *Coulthard* [1943] A.C. 607; 59 T.L.R. 396; [1943] 2 All E.R. 352 and *Whitney* v. *Inland Revenue Commissioners* [1926] A.C. 37; 42 T.L.R. 58 considered.

CASE STATED.

The appellant, Mrs. Ann Gordon Stokes, appealed from a decision of the Commissioners for the Special Purposes of the Income Tax Acts, affirming assessments on her under Case III of Sch. D for the years 1946–47 to 1950–51 inclusive on instalments of maintenance paid to her under an order of the Divorce Division.

The case stated, so far as relevant, provided: On January 24, 1938, the appellant obtained a decree of dissolution of her marriage, and on February 1, 1938, she obtained against her husband an order for maintenance during their joint lives and until further order "at and after the rate of £22 per month free "of tax the said sum to be payable monthly. . . ." At the time of the order the husband was resident in the United Kingdom, but in May, 1946, he left the United Kingdom and went to work and reside in Brazil.

During the whole of the period material to this appeal the husband, who was a British subject, was not resident in the United Kingdom.

The payments made after the husband went abroad (which alone were relevant to this appeal) were paid into the appellant's bank in England by banker's order. There was no evidence that the husband's income had in the relevant years suffered British income tax. He had rendered no account of the payments or of tax deducted under rule 21 (2)[1] of the General Rules, and there was no evidence that he had been required to do so. There was no evidence that the husband possessed sources of income subject to British income tax.

The husband made monthly payments regularly to the appellant throughout the relevant years of assessment, and the Commissioners found as a fact that such payments were made pursuant to the order of 1938. The payments were not always of £22 a month; the amount payable was first reduced by section 25 of the Finance Act, 1941, and section 20 of the Finance (No. 2) Act, 1945. Secondly, down to 1947 the husband paid rather less than the amount due from him and since that date rather more, and the wife had regarded the excess payments in the latter years to be on account of arrears in the earlier years. For the purpose of this appeal the irregularities of payment were ignored and the case proceeded on the footing that the husband had regularly made payments of £22 a month under the order.

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[1] Income Tax Act, 1918, All Schedules Rules, r. 19: "(1) Where any "yearly interest of money, annuity, or "any other annual payment (whether "payable within or out of the United "Kingdom . . .) is payable wholly "out of profits or gains brought into "charge to tax, no assessment shall "be made upon the person entitled to "such interest, annuity, or annual "payment, but the whole of those "profits or gains shall be assessed "and charged with tax on the person "liable to the interest, annuity, or "annual payment, without distinguishing the same, and the person "liable to make such payment, . . . "shall be entitled, on making such "payment, to deduct and retain thereout a sum representing the amount "of the tax thereon at the rate or rates "of tax in force during the period "through which the said payment was "accruing due. The person to whom "such payment is made shall allow "such deduction upon the receipt of "the residue of the same, and the "person making such deduction shall "be acquitted and discharged of so "much money as is represented by "the deduction, as if that sum had "been actually paid."

R. 21: "(1) Upon payment of any ". . . annual payment charged with "tax under Schedule D . . . not payable, or not wholly payable, out of "profits or gains brought into charge, "the person by or through whom any "such payment is made shall deduct "thereout a sum representing the "amount of the tax thereon at the "rate of tax in force at the time of "the payment.

"(2) Where any such payment as "aforesaid is made by or through any "person, that person shall forthwith "deliver to the Commissioners of Inland Revenue . . . an account of "the payment . . . and of the tax "deducted out of the payment . . . "and the Special Commissioners shall "assess and charge the payment of "which an account is so delivered on "that person."

The Commissioners held that the sums received by the appellant under the order were untaxed income in her hands, since they could draw no inference that tax had been deducted under rules 19 and 21 (2) of the All Schedules Rules and they confirmed the assessments to tax on her.

Heyworth Talbot Q.C. and *Geoffrey Tribe* for the appellant. The form of the order of 1938 was, at the time when it was made, the common form with regard to maintenance payments. It must be construed as an order to pay such a sum as after deduction of tax amounts to £22 a month: *Burroughes* v. *Abbott* [2] and *Dayrell-Steyning* v. *Dayrell-Steyning*.[3] The principles laid down in the latter case were attacked in *Spilsbury* v. *Spofforth* [4] and *Wallis* v. *Wallis*,[5] and are no longer followed. The husband's obligation under the order was to pay the sum of £22 net, and the tax on the gross amount would be payable by him. The payment falls within the scope of Case III of Sch. D and of rules 19 and 21 of the All Schedules Rules, which provide for deduction of tax at source. Viscount Simon L.C. in *Allchin* v. *Coulthard* [6] explained the principles of deduction under rules 19 and 21.

If the payments fell within rule 19, the assessment of the appellant was prohibited by the express terms of that rule. If they fell within rule 21, the appellant might be assessed, but only if, and to the extent that, they were gross sums in her hands and tax had not been deducted; but since the payments were made pursuant to the order of the Divorce Division they could not be gross payments, and the only proper inference to be drawn was that the appellant had received net sums after tax had been deducted.

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[2] [1922] 1 Ch. 86; 38 T.L.R. 167.

[3] [1922] P. 280; 38 T.L.R. 898.

[4] [1937] 4 All E.R. 487; 21 T.C. 247.

[5] [1941] P. 69; 57 T.L.R. 523; [1941] 2 All E.R. 291.

[6] [1943] A.C. 607; 59 T.L.R. 396; [1943] 2 All E.R. 352.

The residence of the payer outside the United Kingdom makes no difference as to the application of rules 19 and 21. There can be no possible difference in the character of the payments because the husband has changed his residence, since the order still remains effective in England: *Inland Revenue Commissioners* v. *Gull.*[7] The fact that the Crown may find it difficult to recover the tax is immaterial. The Special Commissioners, under rule 21 (2), are entitled to assess the husband in Brazil: *Whitney* v. *Inland Revenue Commissioners.*[8] If he were assessed to tax while in Brazil and did not pay, the Crown would have a claim against him on his return to this country.

If *Glamorganshire Quarter Sessions* v. *Wilson* [9] is right despite what Viscount Simon L.C. said in *Allchin* v. *Coulthard*,[10] it goes no further than authorizing assessment of the recipient of an annual payment to which rule 21 applies if he has received payment without deduction of tax. Here the appellant has received only the net sums ordered to be paid to her by the court and she cannot be assessed. In effect, the Crown are seeking to impose double taxation upon the appellant.

If these payments are under the order they are tax-free payments in the hands of the applicant; if they are not paid under the order they are merely gratuitous and could be stopped at any moment. They would not then be taxable at all.

[*Lord Advocate* v. *City of Edinburgh* [11] was also referred to.]

John Pennycuick Q.C. and *Sir Reginald Hills* for the Crown. The court must consider first, and apart from any foreign element, what are the rights and liabilities of the husband and wife towards each other, and towards the Crown. It is common ground that, having regard to *Spilsbury* v. *Spofforth*,[12] the husband should pay to the appellant a sum which after deduction of tax should leave a net sum of £22 a month. The net sum of £22 is the yardstick used to measure the gross sum ordered by the Divorce Division. The husband could comply with that order in three ways: (1) he could pay the £22 a month and prove that it had been paid wholly out of profits or gains brought into charge to tax; (2) he could pay the £22 and show that he had deducted tax and accounted to the

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[7] (1937) 54 T.L.R. 52; [1937] 4 All E.R. 290; 21 T.C. 374.

[8] [1926] A.C. 37; 42 T.L.R. 58.

[9] [1910] 1 K.B. 725; 26 T.L.R. 351; 5 T.C. 537.

[10] [1943] A.C. 607; 59 T.L.R. 396; [1943] 2 All E.R. 352.

[11] (1903) 4 T.C. 627.

[12] [1937] 4 All E.R. 487.

Revenue for it; or (3) he could pay £44 (on the assumption that tax was 10s. in the £) to the appellant. The appellant has produced no evidence that the husband has followed courses (1) and (2), and therefore it must be assumed that the payments were on account of a gross sum of £44, and that she is entitled to sue for the balance.

In the absence of any proof that the payments were made out of profits and gains brought into charge, rule 19 cannot apply. Rule 19 (or its equivalent) has long existed in income tax legislation, but when payments were made out of profits or gains not brought into charge, an assessment was, until 1888, always made directly on the recipient. Section 24 (3) of the Customs and Inland Revenue Act, 1888, provided for the first time that a payer in such a case must deduct tax and account for it as a debt due from him to the Crown. Those provisions were substantially re-enacted in rule 21; and the Finance Act, 1927, gave the Crown a right to make an assessment directly on the payer. But those enactments did not take away the existing rights of the Crown to make a direct assessment on the recipient under rule 1 of the Miscellaneous Rules applicable to Sch. D. If, therefore, the payment of £22 be regarded as on account of a gross sum payment, and as the wife has not discharged the burden of showing that the payments had borne tax for which the Crown had received an account, she is liable to be assessed on them: *Hemsworth* v. *Hemsworth* [13] and *Williamson* v. *Ough.* [14]

There is a great difference between rule 19 and rule 21. Under rule 19 the payer is permitted to deduct tax; under rule 21 the payer is bound to deduct tax and account for it to the Revenue. If the husband had performed that duty, then, and only then, would the appellant be taken out of the scope of rule 1 of the Miscellaneous Rules. If he failed to account under rule 21, the appellant was directly assessable under rule 1 of the Miscellaneous Rules: *Hemsworth* v. *Hemsworth* [15] and *Allchin* v. *Coulthard.* [16]

If this argument be correct, it makes no difference that the husband remains abroad. Rule 21 does not apply to a person resident abroad; if one attempted to apply rule 21 to persons abroad without taxable income here, it would be attempting to apply English tax law to persons who are wholly outside the scope of the Income Tax Acts: *Whitney* v. *Inland Revenue Commissioners.* [17] It is not denied that rule 19 could apply to a payer abroad, but in the absence of evidence that the payments were made out of profits and gains brought into charge to tax, the appellant's liability to assessment for the tax remains.

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[13] [1946] K.B. 431; 62 T.L.R. 329.

[14] [1936] A.C. 384; 20 T.C. 194.

[15] [1946] K.B. 431.

[16] [1943] A.C. 607.

[17] [1926] A.C. 37.

Heyworth Talbot Q.C. replied.

Cur. adv. vult.

May 21. UPJOHN J., reading his judgment, having stated the facts, continued: The order of 1938 was made in what was then the common form following certain principles laid down in *Dayrell-Steyning* v. *Dayrell-Steyning*,[1] principles which incidentally have since been attacked and overthrown, see *Spilsbury* v. *Spofforth*,[2] and *Wallis* v. *Wallis*.[3]

Both sides agree, however, that having regard to *Spilsbury* v. *Spofforth* [4] and the earlier case of *Burroughes* v. *Abbott*,[5] an order in that form is to be construed as an order to pay a gross sum of such amount as after deducting income tax for the time being payable in respect thereof will leave the clear monthly sum of £22.

The case has been argued before me by both sides in two stages, first by considering the position on the footing that the husband remained resident at all material times in the United Kingdom, and secondly by considering how that is affected by his residence abroad, and it will be convenient to follow that course in this judgment.

At the first stage it is clear that in making the payments the husband was entitled to deduct tax if he was paying the annuity wholly out of profits or gains brought into charge to tax, and was compelled to do so if he was paying the annuity otherwise than out of such profits or gains. That is the scheme of collection embodied in rules 19 and 21 of the All Schedules Rules of the Income Tax Act, 1918. I need not read those rules, for Lord Simon in *Allchin* v. *Coulthard*,[6] put the matter succinctly [7]: "The three heads under which the existing "scheme of collection of income tax embodied in rules 19 and "21 may be stated are as follows: (*a*) A person liable to pay "any yearly interest of money, annuity or any other annual "payment to a recipient is not entitled to deduct this payment "in arriving at his profits or gains to be assessed and charged "with income tax. If the amount is payable and paid out of his

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[1] [1922] P. 280, 282.
[2] [1937] 4 All E.R. 487.
[3] [1941] P. 69.
[4] [1937] 4 All E.R. 487.
[5] [1922] 1 Ch. 86.
[6] [1943] A.C. 607.
[7] Ibid. 618, 619.

"profits or gains, he is assessed on a sum which includes such "payments, while the recipient is not directly assessed in respect "of the amount at all. Consequently, the Crown gets from the "payer both the tax at the standard rate which would otherwise "be due from the recipient of the annual payment and the tax "due from himself in respect of what is left of his profits and "gains after the payment is made. (*b*) If the annual payment is "payable and paid out of his profits and gains, the payer is "*entitled* to deduct from the payment he makes to the recipient "income tax at the current rate, and the recipient is bound to "allow the deduction on receipt of the residue and to treat "the payer as acquitted of liability to him in respect of the "amount thus deducted. By this means, the payer recoups "himself for the tax which he has paid or will pay on the annual "payment. (*c*) If and in so far as the annual payment is not "payable and paid out of profits or gains brought into charge, "the person making the payment is *bound* to deduct from it "income tax at the current rate and to account to the Crown for "the amount deducted. In effect, the payer in such a case acts "as collector for the Crown of the tax due from the recipient. "The requirement that the recipient must allow the deduction "and treat the payer as acquitted of liability in respect of this "amount is not repeated in r. 21, but must be implied."

It is contended on behalf of the Crown that these monthly payments of £22 must be taken to be gross sums, because it is said that having regard to the proper construction to be put upon the order of 1938 the husband could comply with it in three ways, (a) by paying £22 and producing evidence that he has paid it wholly out of profits or gains brought into charge to tax, (b) by paying £22 and producing evidence that he has accounted for and paid tax to the Revenue, or (c) by paying £44 (assuming tax to be at 10s. in the £) cash to the appellant.

Then it is said that the appellant cannot prove that the requirements of (a) or (b) are satisfied, so that she can still sue for the gross sum of £44 each month, and in the meantime she must be taken to have received £22 on account of a gross sum of £44, and in respect of this gross sum she is directly assessable to tax. The wife admits that she cannot prove that the husband made a deduction pursuant to rule 19, so I need not further consider that particular matter.

It will be convenient next to consider the validity of the last step in the Crown's argument, namely, assuming the appellant to have received a gross sum, can she be directly assessed to tax?

A gross sum of this nature is admittedly chargeable to tax under paragraph 1 (*b*) of Sch. D falling within Case III. Mr. Pennycuick for the Crown pointed out that, while the equivalent of rule 19 has been present in income tax legislation from the earliest times, yet when payments were made otherwise than out of profits or gains brought into charge to tax the gross sum had to be paid, and until the year 1888 an assessment was made directly upon the recipient under the earlier taxing provisions corresponding to rule 1 of the Miscellaneous Rules applicable to Sch. D. This was altered by section 24 (3) of the Customs and Inland Revenue Act, 1888, which contained provisions (substantially re-enacted in rule 21 of the All Schedules Rules) compelling the payer to deduct tax and making the tax deducted from the annuity a debt due from the person deducting the tax to the Crown. The Finance Act, 1927, improved the machinery of collection by enabling the Crown to make an assessment upon the person who deducted the tax and giving them ancillary rights to enforce collection against him. But, said Mr. Pennycuick, the power to make an assessment directly upon the recipient remained. He relied on *Glamorganshire Quarter Sessions* v. *Wilson*,[8] in support of that view. Mr. Heyworth Talbot for the appellant challenged the binding authority of that case having regard to the passage in Lord Simon's opinion in *Allchin* v. *Coulthard*[9] which I have read and to the alteration of the law in 1927. In my judgment, the Finance Act, 1927, only improved the machinery but was not intended to alter any principle of collection, and *Glamorganshire Quarter Sessions* v. *Wilson*[10] is a direct decision upon the point, not directly overruled by anything in *Allchin* v. *Coulthard*[11] and is binding upon me. I would point out, however, that Bray J. in the last paragraph of his judgment in *Glamorganshire Quarter Sessions* v. *Wilson*[12] made it clear that he was only deciding that a gross sum is chargeable by direct assessment upon the recipient. If, therefore, upon the true view of the facts of this case and of the law applicable thereto the appellant is to be treated as having a sum of untaxed income in her hands she is, in my view, directly assessable to tax.

I turn then to the submission of the Crown, which (omitting consideration of any rule 19 payment) may be further analysed in this way: that the payment of £22 must be treated as being intended to be payment on account of an obligation to pay £44,

[8] [1910] 1 K.B. 725.
[9] [1943] A.C. 607.
[10] [1910] 1 K.B. 725.
[11] [1943] A.C. 607.
[12] [1910] 1 K.B. 725.

unless it be proved (i) that the husband has in fact deducted tax, and (ii) accounted for and paid the tax deducted to the Crown.

On the first point I was referred to a decision of Denning J. in *Hemsworth* v. *Hemsworth*.[13] The report is very short. It was an action between husband and wife, and turned solely upon the question whether as between payer and payee the husband could claim that he had made a deduction under rule 19 (where, of course, the right to deduct is optional) without notifying the wife that he had done so and without providing her with a calculation showing the amount deducted. In that case it is to be noted that the obligation was to pay a gross sum, and the net sum payable would vary according to the rate of tax, so (especially where there were heavy arrears extending over a number of years) it would be right to compel the husband to make the calculation of the net sum due and notify the wife accordingly. Whether that would be necessary in a case such as this, where the net sum is fixed and the gross sum varies according to the rate of tax, I need not consider. What was also important in that case was that down to 1940 the husband had paid the wife the gross sum due without exercising his right to deduct tax. On a consideration of all the facts, the judge came to the conclusion that in making several comparatively small payments on account the husband must be taken to have made gross payments.

The facts of that case are far removed from the present, and I do not derive any assistance from it. No general principle is there laid down, except possibly in relation to rule 19. The facts of this case are that the husband made, more or less exactly, payments of the net sums prescribed by the order, and in my judgment the only permissible inference to be drawn from that is that he was intending to and did deduct tax from the gross amount which was due from him upon the proper construction of the order.

There is no magic in the word "deduct." It merely means that less is paid and the balance is retained if rule 19 is applicable; if rule 21 is applicable the balance unpaid, being the amount representing the tax, is or ought to be paid to the Crown.

I turn then to the last point of the Crown, that whatever was intended by the parties, payment of the monthly sum must be treated as a gross sum unless and until it be proved that the amount has been accounted for and paid to the Crown. That is a question of construction of rule 21. Subrule (1) provides that upon payment of the annuity the payer shall deduct the amount of tax. Subrule (2) provides that where any such payment is made the payer "shall forthwith" deliver an account to the Commissioners and so on. The Commissioners have wide powers of collection of the tax from the payer; the payee has none. The payee cannot sue for the balance on the footing that she has been paid a gross sum, because she will be met with a defence under rule 21 (1), that rule being construed in the light of the implication to be read therein: see *per* Lord Simon in the passage which I have read from *Allchin* v. *Coulthard*.[14] Moreover, there is nothing in the Act which entitles the payer to say that he has deducted tax if, but only if, he can produce a receipt from the Commissioners. In my judgment the construction propounded by the Crown strikes at the whole scheme of collection of tax in these cases, and is not justified by the words used in the rule.

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[13] [1946] K.B. 431.

In my view, if I am right in coming to the conclusion that the appellant is to be treated as the recipient of a sum from which tax has been deducted by the payer, that sum is, so far as she is concerned, to be treated as a sum which has borne tax, and no further assessment in respect of tax can be raised upon her. Collection of the tax which has been deducted is a matter entirely between the Crown and the payer.

I reach the end of the first stage by concluding that if the husband were still resident in this country the Crown's claim would fail.

At the second stage, how is the matter affected by the continued residence of the husband in Brazil?

The Crown submit, and the Commissioners accepted the view, that, where the payer is resident abroad, rule 21 has no application. Consequently it was said (and on the footing that rule 21 does not apply, rightly said) that the husband's obligation was, on the proper construction of the order, an obligation to pay the gross sum provided by the order and not the net sum, so that the monthly payments of £22 must be taken to be payments on account of the gross sums due which have not borne tax in the hands of the recipient. The whole question is, does rule 21 apply? As a matter of construction of the Act it seems to be clear, and indeed the contrary was not seriously pressed, that rule 21 is as applicable to a person resident abroad as to one resident in the United Kingdom, and it was conceded that rule 19 was so applicable. It was said, however, that the Income Tax Act, in the words of Lord Wrenbury in *Whitney* v. *Inland Revenue Commissioners*,[15] "has nothing to do with the foreign income of one who "is not a British subject and who is not resident here."[16] A little later he said[16]: "The Act nowhere purports to tax income which "is neither derived from property in the United Kingdom nor "income received by a person resident in the United Kingdom." Therefore, it is said, to apply rule 21 to a person resident abroad (having, as I must assume, no English income of his own) would conflict with the above principle and would result in the taxation of a person wholly outside the scope and ambit of the Income Tax Acts.

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[14] [1943] A.C. 607, 618, 619.

I think that there is a short answer to that. The income sought to be taxed is the income of the appellant, a person resident in this country, and it arises under an order of this court. There is no foreign element about the income at all. The husband has in his hands tax upon this English income which he has withheld solely in reliance upon an Imperial statute. He holds that income, as Lord Simon said in *Allchin* v. *Coulthard*,[17] in the passage which I have already quoted,[18] in effect as collector for the Crown of tax due from the recipient. That is, he is an agent bound to account to his principal. The Crown may not be able to recover it in a foreign court, as it would be in the nature of an action to enforce our revenue laws, but there can be no doubt of the matter in principle. *Whitney* v. *Inland Revenue Commissioners*[19] also shows that even if the husband were an alien, which he is not, an assessment could be made upon him directly in his own name at his address abroad for tax in respect of English income. In my judgment, the husband having tax on English income in his hands as an agent can be in no better position.

It follows, in my judgment, that the claim of the Crown fails. The appeal must be allowed and the assessments discharged. The Crown must pay the appellant's costs.

The appellant is legally aided, and her costs must be taxed as between solicitor and client for the purposes of the Legal Aid and Advice Act, 1949.

Appeal allowed.

Solicitors: *Taylor, Jelf & Co.; Solicitor of Inland Revenue.*

I. G. R. M.

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[15] [1926] A.C. 37.

[16] Ibid. 56.

[17] [1943] A.C. 607.

[18] Ibid. 618, 619.

[19] [1926] A.C. 37.

JACKSON AND OTHERS v. HAMLYN AND OTHERS.

[1953 J. 590.]

1953
Jan. 23,
27, 28.

Upjohn J.

Company—Meeting—Motion to adjourn for 30 days—Poll demanded and taken—Result to be announced later as meeting-hall to be vacated—If poll against adjournment another meeting to be held as soon as possible—Poll against adjournment—Whether meeting to be convened in due course a continuation of original meeting.

Pursuant to a notice by the plaintiffs, who were shareholders in a company with the policy of which they were dissatisfied, the individual defendants, who were the directors, convened a meeting for January 20, 1953. The chairman of the company presided. After about three hours a motion that it be adjourned for a month was carried and the first plaintiff thereupon in effect demanded a poll. That would have taken at least two hours, the meeting-hall was free for only 45 minutes more, and it was impracticable to continue the meeting elsewhere. The chairman said that he would have to adjourn the meeting, as the result of the poll could not be announced forthwith; and after discussion he said that the poll would be taken then and there, and its result announced later; that, if it was in favour of adjournment, the meeting would stand adjourned for 30 days; and that, if not, another meeting would be held as soon as possible. The chairman and the first plaintiff agreed orally that neither side should indulge in propaganda or circularise members otherwise than by sending out a bare notice of the date and time of the meeting. The poll was taken, defeating by a large majority the motion to adjourn for 30 days, which result was made public on January 22, 1953, the defendants informing the plaintiffs that they would resume the meeting on January 29:—

Held, that, by virtue of the company's articles of association and of the provisions of the Companies Act, 1948, the meeting to be convened by the directors in due course was a continuation of the meeting of January 20, 1953—which did not continue on that date solely because it was physically impossible that it should do so—and that, accordingly, no proxies deposited after January 18, 1953, would be valid, as the articles required proxies to be deposited 48 hours before the holding of a meeting.

Shaw v. *Tati Concessions Ld.* [1913] 1 Ch. 292; 29 T.L.R. 261 applied.

MOTION.

The plaintiffs were shareholders in a company, and had been, for some few months, dissatisfied with its affairs. The issued capital of the company was 984,300 preference shares of £1 each, fully paid, and 656,200 issued ordinary shares, all fully paid. There were about 6,000 members. The plaintiffs, so far as concerned the holding of shares in their own names, were quite small shareholders and they had held shares for only quite a short time, but it was said on their behalf that they controlled a large number of others through nominees. All the individual defendants were and had at all material times been directors of the company.

In October, 1952, there started a battle of circulars, the plaintiffs circularizing the shareholders and replies being made by the company. That went on for some time, and ultimately the plaintiffs, by a notice dated November 28, 1952, and served on the company, requisitioned an extraordinary general meeting, and set out their proposed resolutions. The first one was: "That in view of the extremely unsatisfactory record of this "company as regards capital values and earnings, this meeting "has no confidence in the present management." The next resolution asked that two of the defendants should resign from the board of the company; and the third that yet another director be asked to resign; the fourth that the three plaintiffs should themselves be appointed directors of the company, and the fifth that a committee of ordinary and preference shareholders should be set up.

Pursuant to that requisition, the company sent out notices dated December 31 convening a meeting, to be held at Winchester House on Tuesday, January 20, 1953, to consider the requisition as to resolutions which were then set out. The board itself added one further resolution with regard to one of its properties at Beaulieu.

That meeting was duly held. It was presided over by Brigadier R. A. Hamlyn, the chairman of the company. There was in evidence before the court a shorthand note of what took place at that meeting, and it was accepted by both sides as sufficiently accurate for the purposes of this motion. That meeting started at 12 o'clock. It was long and stormy. A number of shareholders expressed differing views and after a time everyone became rather tired. At about 3 o'clock, when the meeting had been going on for some three hours, a shareholder moved an adjournment for one month, which was carried on a show of hands.

The first plaintiff, Mr. Leonard Percival Jackson, in effect then demanded a poll. The chairman was informed by the scrutineers that to take the poll and reconcile the figures would take at least two hours, whereas the hall in Winchester House which the shareholders were occupying was let from 3.45 p.m. that afternoon. It was therefore impossible for the meeting to continue in that room. There was discussion about whether it was possible to get another room in Winchester House or to transfer the meeting to a room in the Mayfair Hotel, which was one of the company's properties. However, the chairman did not think either course practicable. He said: "I am advised "by my lawyer that I have no alternative but to adjourn the "meeting, because it is impossible to announce the result of the "poll at the present time." Then a shareholder made the suggestion about the Mayfair Hotel and the chairman said: "I "do not think it is practical as there are a number of people here "who do not want that. Anyhow we have got to have a poll "and we have got to have the meeting at a different time. I "do not see how there is any other method of conducting this "meeting at the present time, so it stands adjourned, and we "will call a meeting." Mr. Jackson then said: "Mr. Chairman, would you give me your authority under the articles of "association for acting in this way? I insist upon that." Then there was a discussion, and, as a result, the legal advisers of some of the parties all met to consider what was to be done. Then after an interval when they discussed this matter, the chairman said: "Gentlemen, a poll has been demanded, on the "following motion: 'That this meeting stands adjourned for 30 "'days.' The poll will be taken now; I think many of the "cards, or most of the cards, are in, and those who have not "put them in, I wish they would. As it is impracticable to "complete the business of the meeting now, under existing "conditions—this hall has to be given up, and also it will take "two or three hours to check the papers—the result of the "poll will be announced later. If the poll is in favour of "adjournment the meeting will stand adjourned for 30 days; "if against, another meeting will be called as soon as practicable, "and that will be, I propose, in a week's time." Mr. Jackson thereupon made a further protest, and then said: "Mr. Chairman, if I may, I would like to have your assurance that in the "intermediate period there will be no question of you yourselves "issuing circular letters to members of the company—I will give "an undertaking not to do so—and that all that you will do is "to send out a bare notice of the date and time of the meeting. "You will give that undertaking?" The chairman said "That "is right," and Mr. Jackson said "No propaganda on either "side," to which the chairman said "That is right—I agree "to that." The meeting then terminated.

The poll was taken at once and its result (which was the defeat by a substantial majority of the resolution to adjourn for 30 days) was made public on January 22. The defendants informed the plaintiffs that they would resume the meeting on January 29; and, also on January 22, Mr. Jackson stated in a notice which he issued that there was an alleged breach by the defendants of the agreement, that what they were alleged to be about to do would be a breach of the undertaking, and that application would be made for an injunction to restrain the directors from taking steps. On January 23 the court was moved ex parte on behalf of the plaintiffs for an injunction to restrain the individual defendants from sending or procuring the company to send to members until after the conclusion of the meeting of January 20 and any continuation or adjournment of that meeting (save as required by law) any document or communication other than a communication of the date, time and place of any continuation or adjournment of that meeting. Mr. Jackson's affidavit in support of the application stated that the directors intended to send notices to the shareholders of the new time and place of meeting, with new forms of proxies and invitations to revoke the old ones and use the new in favour of the directors. The affidavit did not mention Mr. Jackson's own notice and contained a statement by him that he had observed the terms of the undertaking himself and would, of course, continue to do so.

On January 27 the matter again came before the court, and during the hearing reference was made to the notice which Mr. Jackson had issued. The plaintiffs asked that the ex parte injunction be continued, and asked also for an injunction to restrain the defendants from treating any proxy received by or on behalf of the company after January 18, 1953, as valid for the purposes of the continuation or adjournment of the meeting proposed to be held on January 29, 1953.

Sir Andrew Clark Q.C. and *R. B. S. Instone* for the plaintiffs. The matter resolves itself into the question whether the meeting which will be resumed will be an adjourned meeting. If so, the plaintiffs are not entitled to the relief for which they ask. If, however, it will be simply a continuation of the original meeting, they are entitled to that relief: *Shaw* v. *Tati Concessions Ld.*[1] Four of the company's articles of association are relevant and provide as follows: "63. The chairman, with the consent of any

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[1] [1913] 1 Ch. 292; 29 T.L.R. 261.

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"meeting at which a quorum is present, may adjourn the meeting "from time to time and from place to place, as the meeting "shall determine" (and the article provides that if a meeting is adjourned for 10 days or longer notice of the adjourned meeting must be given). "65. At any general meeting of the company "a resolution put to the vote of the meeting shall be decided on "a show of hands unless before or upon the declaration of the "result of the show of hands a poll be demanded in writing by "the chairman or by at least five members present in person or "by proxy and entitled to vote at the meeting. . . . 67. A poll "duly demanded on the election of a chairman of a meeting or "on any question of adjournment shall be taken immediately at "the meeting and without adjournment. . . . 77. The instrument "appointing a proxy and the power of attorney or other authority, "if any, under which it is signed, or a notarially certified copy of "such power or authority, shall be deposited at the office at least "48 hours before the time appointed for holding the meeting or "adjourned meeting at which the person named in such instrument proposes to vote; otherwise the person so named shall not "be entitled to vote in respect thereof."

The plaintiffs contend that the meeting which will be resumed will be no more than a continuation of the original meeting and that, accordingly, proxies deposited at the office after 12 noon on January 18—that is to say, less than 48 hours before the time appointed for holding the meeting of January 20—are invalid. At the meeting of January 20 a shareholder moved an adjournment for a month. That was carried by a show of hands, whereupon the first plaintiff demanded a poll. The result of the poll was that the resolution to adjourn for 30 days was heavily defeated. On the true construction of article 63 the chairman cannot adjourn a meeting without the meeting's consent: cf. *National Dwellings Society* v. *Sykes* [2]; nor, on the other hand, can a meeting adjourn itself—the actual adjournment must be by the chairman; and it has been held that, where an article provided that the chairman might with the consent of the members present at any meeting adjourn the same, on the true construction of the article the chairman was not bound to adjourn a meeting, even though a majority of those present desired the adjournment: *Salisbury Gold Mining Co.* v. *Hathorn.*[3] In the present case there was neither consent by the meeting nor adjournment by the chairman. What happened was simply that the meeting could not continue at Winchester House because the room in which it was being held was not available for a sufficiently long time. The plaintiffs therefore ask for an injunction as claimed in the notice of motion and for a declaration that the meeting which will be convened will be a continuation of that of January 20 and that no proxies deposited after 12 noon on January 18 will be valid.

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[2] [1894] 3 Ch. 159; 10 T.L.R. 563.

[3] [1897] A.C. 268; 13 T.L.R. 272.

J. B. Lindon Q.C. and *Kenneth W. Mackinnon* for the defendants. The plaintiffs cannot rely on *Shaw* v. *Tati Concessions Ld.*[4] In that case article 74 provided: "If a poll is demanded " . . . it shall be taken in such manner, and at such time and place " as the chairman of the meeting directs, and either at once or " after an interval, or adjournment, or otherwise, and the result " of the poll shall be deemed to be the resolution of the meeting " at which the poll was demanded." All that happened in that case was that a poll was demanded and was directed to be taken at a future date. The meeting was not adjourned and, in fact, there was no second meeting. It was held that the mere postponement of the poll was not an adjournment within the meaning of an article allowing the lodgment of proxies 48 hours before a meeting " or adjourned meeting," but that the original meeting continued for purposes of the poll and no fresh proxies could be lodged. In the present case, article 67 prescribes that " a poll " duly demanded . . . shall be taken immediately at the meeting " and without adjournment." That was exactly what happened. The poll was taken, the result of it not being declared until two days later, and being a defeat of the motion to adjourn. Nevertheless, the meeting which is to be resumed must be either an adjourned meeting or a new meeting altogether. If it will be an adjourned meeting, new proxies will be valid provided that they are deposited 48 hours before the adjourned meeting, in accordance with article 77. If it will be a new meeting altogether, then, in accordance with article 63 and with section 133 (1) (*b*) of the Companies Act, 1948, 14 days' notice must be given. It must be either one or the other, and certainly cannot, as the plaintiffs contend, be a mere continuation of the original meeting. By dictionary definition, " meeting " means " assembly " and also " encounter." The meeting in the present case was clearly an assembly. Equally clearly, it came to an end when, after the poll had been taken, those present left the place where the meeting had been held. Notwithstanding that the result of the poll, announced later, was the heavy defeat of the resolution to adjourn for 30 days, it would be unsound to call the meeting which is to be resumed a continuation. It may be held somewhere else, and may be attended by members who were not present on the first occasion.

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[4] [1913] 1 Ch. 292; 29 T.L.R. 261.

The right to adjourn a meeting and to come together at another time is a right at common law. The matter is not left there, however, and, under the articles of association of companies, adjournments are specifically provided for and machinery is prescribed with the very object of enabling companies to avoid having to ask whether they will have the authority to proceed with business undisposed of at one meeting by coming together at another. It would neither be a correct use of language nor accord with common sense to describe the resumed meeting as a continuation. Thus, if it is an adjourned or a new meeting, new proxies may well be valid for it provided that there is conformity with the articles and the Act. Therefore, since the plaintiffs neither represent all other shareholders save the defendants nor purport so to do, an injunction should not be granted against the defendants. The court should declare that the resumed meeting will be either an adjourned meeting or a new one, thus enabling the defendants to treat as valid proxies received by the company on or after January 18, 1953. [*Grundt* v. *Great Boulder Proprietary Gold Mines Ld.*,[5] *Catesby* v. *Burnett*[6] and *Wall* v. *London and Northern Assets Corporation*[7] were referred to.]

R. B. S. Instone in reply. The meeting was neither terminated nor adjourned. On any view, it was not " adjourned " within the meaning of the company's articles so far as article 77 is concerned. If the proxies are to be validated, the validation must depend on section 136 of the Companies Act, 1948. In subsection (2) the commencing words are " in every notice calling " ' a meeting ' "—not " ' an adjourned meeting.' " It is clear that the words " or an adjourned meeting " are not to be read into subsection (2). That fits in with the policy of the Act, because the purpose of the section was to give people the opportunity of sending in proxies, but not of sending in proxy after proxy. The meeting in the present case is not validly adjourned according to the articles. If calling a meeting means calling also an adjourned meeting, it must mean the same thing in section 133. Also, if " calling a meeting " in section 136 (2) means calling an adjourned meeting, it is a little odd that the parenthesis in section 133 was put there without being clarified in section 136.[8]

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[5] [1948] Ch. 145; [1948] 1 All E.R. 21.

[6] [1916] 2 Ch. 325; 32 T.L.R. 380.

[7] [1898] 2 Ch. 469; 14 T.L.R. 547.

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[8] Companies Act, 1948, s. 133: "(1) "Any provision of a company's articles "shall be void in so far as it provides "for the calling of a meeting of the "company (other than an adjourned "meeting) by a shorter notice than— "(*a*) in the case of the annual general "meeting, 21 days' notice in writing; "and (*b*) in the case of a meeting "other than an annual general meeting or a meeting for the passing of "a special resolution, 14 days' notice "in writing in the case of a company "other than an unlimited company "and 7 days' notice in writing in the "case of an unlimited company.

"(2) Save in so far as the articles "of a company make other provision "in that behalf (not being a provision "avoided by the foregoing subsection) "a meeting of the company (other "than an adjourned meeting) may be "called—(*a*) in the case of the annual "general meeting by 21 days' notice "in writing; and (*b*) in the case of "a meeting other than an annual "general meeting or a meeting for the "passing of a special resolution, by "14 days' notice in writing in the "case of a company other than an "unlimited company and by 7 days' "notice in writing in the case of an "unlimited company.

"(3) A meeting of a company shall, "notwithstanding that it is called by "shorter notice than that specified in "the last foregoing subsection or in "the company's articles, as the case "may be, be deemed to have been "duly called if it is so agreed—(*a*) in "the case of a meeting called as the "annual general meeting, by all the "members entitled to attend and vote "thereat; and (*b*) in the case of any "other meeting, by a majority in "number of the members having a "right to attend and vote at the "meeting, being a majority together "holding not less than 95 per cent. in "nominal value of the shares giving "a right to attend and vote at the "meeting, or, in the case of a company not having a share capital, "together representing not less than "95 per cent. of the total voting rights "at that meeting of all the members."

S. 136: "(1) Any member of a company entitled to attend and vote at "a meeting of the company shall be "entitled to appoint another person "(whether a member or not) as his "proxy to attend and vote instead "of him, and a proxy appointed to "attend and vote instead of a member "of a private company shall also have "the same right as the member to "speak at the meeting: Provided "that, unless the articles otherwise "provide—(*a*) this subsection shall not "apply in the case of a company not "having a share capital; and (*b*) a "member of a private company shall "not be entitled to appoint more than "one proxy to attend on the same "occasion; and (*c*) a proxy shall not "be entitled to vote except on a poll.

"(2) In every notice calling a meeting of a company having a share "capital there shall appear with "reasonable prominence a statement "that a member entitled to attend "and vote is entitled to appoint a "proxy or, where that is allowed, one "or more proxies to attend and vote "instead of him, and that a proxy "need not also be a member; and if "default is made in complying with "this subsection as respects any "meeting, every officer of the company who is in default shall be liable "to a fine not exceeding fifty pounds.

"(3) Any provision contained in a "company's articles shall be void in "so far as it would have the effect of "requiring the instrument appointing "a proxy, or any other document "necessary to show the validity of or "otherwise relating to the appointment of a proxy, to be received by "the company or any other person "more than 48 hours before a meeting "or adjourned meeting in order that "the appointment may be effective "thereat.

"(4) If for the purpose of any "meeting of a company invitations "to appoint as proxy a person or one "of a number of persons specified in

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UPJOHN J. [having stated the facts]:—The first paragraph of the motion depends on what is said to have been the agreement reached at the end of the meeting on January 20 arising out of the last few words thereat which passed between the chairman and Mr. Jackson. It is said that there was a binding agreement not to issue circular letters to members and not to have any propaganda on either side pending the result of the poll and the convening (to use a neutral expression) of a new meeting. For reasons which I shall mention in a moment, I have not called on counsel for the defendants to address me on that matter. Therefore, I do not decide whether in fact that amounts to a legally binding agreement or not. I will assume that it does so.

On that footing, leading counsel for the plaintiffs moved this court ex parte on Friday last, stating that the directors, in breach, it was said, of this agreement, were intending to send out notices to shareholders of the new time and place of meeting, coupled with new forms of proxy and an invitation to revoke the old proxies in favour of the plaintiffs and to send in new proxies in favour of the defendants. That, it was said, was a plain breach of the agreement, and on that I granted an ex parte injunction, which is still running until my judgment on this motion is complete.

[His Lordship then proceeded, without deciding any matter of law or principle, to refuse an injunction on paragraph 1 of the notice of motion relating to the alleged breach of the undertaking not to issue propaganda, and continued as follows:] That leaves outstanding, however, a much more important and difficult point arising on paragraph 2 of the notice of motion. During the hearing certain points were raised by the defendants which were said to be difficulties in the way of the plaintiffs. It was said that they were not suing or purporting to sue on behalf of themselves and all other shareholders except the defendants,

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"the invitations are issued at the "company's expense to some only of "the members entitled to be sent a "notice of the meeting and to vote "thereat by proxy, every officer of the "company who knowingly and wilfully authorizes or permits their "issue as aforesaid shall be liable to "a fine not exceeding one hundred "pounds: Provided that an officer "shall not be liable under this sub-"section by reason only of the issue to "a member at his request in writing "of a form of appointment naming "the proxy, or of a list of persons "willing to act as proxy if the form "or list is available on request in "writing to every member entitled to "vote at the meeting by proxy.

"(5) This section shall apply to "meetings of any class of members of "a company as it applies to general "meetings of the company."

and, therefore, no injunction could be granted against the defendants because third parties would be affected; that is to say, parties who might desire to put in proxies for the meeting which is to be resumed at some date. However, the defendants themselves expressed the desire to receive direction on this matter as to their correct and proper course; and so, by consent, it has been agreed that I am to treat this motion, so far as paragraph 2 is concerned, as the trial of the action. I shall not grant any injunction in any event; but I shall make a declaration appropriate to the terms of my judgment. That, as I say, has been done by agreement, but, equally, it is quite plain that that agreement will not preclude either side from appealing from my judgment should they so desire.

Before considering the second paragraph of the notice of motion in any detail, I must refer to some of the articles of association of the company. The first one to which I need refer is article 63 and is: "The chairman, with the consent of any "meeting at which a quorum is present, may adjourn the "meeting from time to time and from place to place, as the "meeting shall determine." Then it is provided that where the meeting is adjourned for 10 days or more notice of the adjourned meeting is to be given.

Article 65 provides: "At any general meeting of the company "a resolution put to the vote of the meeting shall be decided on "a show of hands unless before or upon the declaration of the "result of the show of hands a poll be demanded in writing by "the chairman or by at least five members present in person or "by proxy and entitled to vote at the meeting. . . ." By article 67: "A poll duly demanded on the election of a chairman of a "meeting or on any question of adjournment shall be taken "immediately at the meeting and without adjournment." That perhaps is the most vital article. By article 77: "The instru-"ment appointing a proxy and the power of attorney or other "authority, if any, under which it is signed, or a notarially "certified copy of such power or authority, shall be deposited "at the office at least 48 hours before the time appointed for "holding the meeting or adjourned meeting at which the person "named in such instrument proposes to vote; otherwise the "person so named shall not be entitled to vote in respect "thereof."

What in fact happened was that when the meeting terminated on January 20 (I use that as being a neutral expression), a poll was taken. Apparently one or two legal questions arose, but ultimately scrutineers agreed on the matter. The result of the poll was made public on January 22, 1953, and the motion for adjournment for 30 days was lost by a substantial majority. The voting against was 670,261 votes to 423,428 in favour of the adjournment.

The whole question which I have to decide is, in substance, this: At the meeting which will be resumed (again a neutral expression) one day, no doubt as soon as practicable, can new proxies be used provided they are deposited 48 hours before the resumption or not? The defendants say that the resumed meeting will either be an adjournment of the meeting of January 20, in which case, having regard to article 77, new proxies can be deposited for use at the adjourned meeting, or that it will be a wholly new meeting, the meeting of January 20 having been dissolved. If the latter is the true view, then, of course, a 14 days' notice must be given under the articles and the Companies Act, 1948, and technically the directors could, of course, include completely new business. In saying that, I am not suggesting that they would in fact do any such thing. The view expressed by the plaintiffs is that the resumed meeting will be a mere continuation of the meeting which has been interrupted, and, therefore, no proxies which have been deposited with the company after the hour of midday on January 18 of this year are valid. That is a short but difficult question.

At the meeting it was quite clear that the chairman behaved with the utmost propriety in extremely difficult circumstances, and, indeed, the contrary is not suggested. A poll was demanded on a question of an adjournment, and having regard to article 67 that poll had to be taken immediately at the meeting. Had that been possible, of course, it would have been taken at the meeting, and in the event, as we now know, the meeting would have continued to discuss the business before it, the motion for the adjournment having been lost. That course, however, was not practicable. The scrutineers were going to take two or three hours—in fact, they took a great deal longer—to count the voting on the poll, and the room at Winchester House was no longer available and, therefore, the chairman very rightly said: "If the motion is against, another meeting will be "called as soon as practicable, and that will be, I propose, in "a week's time." That was a very sensible proposal. I am quite satisfied that no one had in mind at that moment the difficulties that might arise as the result of that proposal. No one was thinking at that time of the difficulty that might arise as to proxies, or whether it would be an adjourned meeting, or a new meeting, or whether it was going to be a continuation of an existing meeting. I do not think, therefore, that anything that actually took place at that meeting assists me in consideration of this difficult matter.

One thing, however, does seem to me clear. The only resolution for an adjournment that was before the meeting was for an adjournment for 30 days, and on that a poll was demanded. No one suggested any adjournment while that poll was being taken; and it seems to me quite clear, therefore, that for the purposes of article 63 of the articles of association there was no adjournment of the meeting, because the chairman did not adjourn the meeting and did not receive the consent of the meeting to any adjournment. With all respect to the contrary argument, I do not see how in this case it can be suggested there was any adjournment. The only motion for an adjournment was lost.

Then it is said—the argument is subtle and attractive—"Look at the true meaning of the word 'meeting' and here you "find a meeting has ceased. The meeting ceased when the "parties, by common consent, left Winchester House and went "about their separate ways." One cannot, it is said, without importing some unjustifiable fiction into the matter, assume that the meeting is continuing the whole time, and that when it resumes the same meeting is in existence. It is pointed out that the meeting may be in a different place. Certainly a large number of different shareholders will be there, and it is really a misuse of language and quite unrealistic to say that this resumed meeting is really a continuation of the meeting which was held on January 20.

I am unable to accept that contention. The sole reason that the meeting did not in fact proceed on January 20 was due to the physical impossibility of continuing it further. Had that been possible, it would have continued. If the poll had taken perhaps half an hour, the meeting would have continued, and the main business before the meeting would have been debated. If I am to treat the meeting as having been dissolved, because it was physically impossible to count the votes then and there and continue the meeting, the result would indeed be extraordinary; because in law, as I have already pointed out, the reconvened meeting would be a new meeting at which new business could be considered, not necessarily including the business for which the dissolved meeting was requisitioned, and therefore the result of the opposition to the adjournment on which the plaintiffs succeeded would be to place them in a far worse position than if they had supported the adjournment.

The defendants have appealed to common sense in this case, but, in my judgment, common sense is entirely on the side of the plaintiffs. If for physical reasons such as I have mentioned it was impossible to continue the meeting then and there, I personally feel no difficulty in assuming that the new meeting which is to be convened when the result of the poll is known is a continuation of the existing meeting. The argument to the contrary is addressed to a precise meaning of the word " meeting " and (if I may say so) is somewhat metaphysical. Fortunately, metaphysics and business men seldom meet.

It seems to me that I must give business efficacy to article 67 of the articles of association. The words " A poll on any question " of adjournment shall be taken immediately " mean that it must be taken as soon as practicable in all the circumstances, and if, owing to the number of shareholders or proxies or to some other reason, it is impossible then and there to go on with the meeting, in my judgment any meeting that is convened to hear the result of the poll and to continue with the business of the meeting if the motion for the adjournment be lost must be a continuation of the existing meeting.

I am supported in that view by *Shaw* v. *Tati Concessions Ld.*[1] I do not propose to examine it in detail because, as was rightly urged by the defendants, it was in some respects a different case. There was no second meeting there. All that was to happen was that a poll was to be taken, and it is perfectly true that much depended on the form of article 74 of the articles of association of the company in that case, which is not present in this case; but, nevertheless, Swinfen Eady J. did not feel any difficulty in holding that a meeting must be deemed to continue for the purpose of taking a poll until the poll is closed.

I feel no difficulty here in finding that the meeting must be deemed to continue for the transaction of the business at the original meeting which has been interrupted for the purely physical reasons which I have already indicated. Accordingly, I propose to declare that the meeting which will be convened by the directors in due course is a continuation of the meeting on January 20, and that no proxies deposited after midday on January 18 will be valid.

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[1] [1913] 1 Ch. 292; 29 T.L.R. 261.

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[After discussion, his Lordship said that there would be no order as to costs.]

Declaration accordingly.

Solicitors: *Tudor & Rowe; Markby, Stewart & Wadesons.*

K. R. A. H.

1953
June 24, 25, 26.

Harman J.

DEAN *v.* PRINCE AND OTHERS.

[1952 D. No. 253.]

Company—Valuation of shares under article—Reasons given for valuation certificate—Court's power to consider reasons—Break-up value of assets—Control of company on sale of shares disregarded.

The articles of association of a company provided that, in certain circumstances, shares in it should be purchased at a price to be certified by an auditor as a fair value; the auditor stated that his valuation of a parcel of shares, constituting a controlling interest in the company, was on the basis of the break-up value of the assets and not as a going concern and that he had not attributed any value to the control of the company afforded by those shares:—

Held, (1) that as the auditor had given his reasons for his valuation, the court was not precluded from considering those reasons.

Johnston v. *Chestergate Hat Manufacturing Co. Ld.* [1915] 2 Ch. 338 considered.

(2) That the auditor had proceeded on a wrong basis in considering only the break-up value of the assets, and that he should not have neglected to consider the value to be derived from the control of the company through that parcel of shares; and accordingly the valuation was invalid and not binding on the parties.

Attorney-General for Ceylon v. *Mackie* [1952] 2 All E.R. 775 applied.

ACTION.

The plaintiff, Mrs. M. Lilian Dean, was the sole executor of the will of her husband who died on November 6, 1951. At his death he was the registered holder of a controlling interest, consisting of 140 fully paid shares of £1 each, in the capital of Dean & Mulhall Ld., a private company, the third defendant. The nominal capital of the company was £200 divided into £1 shares; the remaining 60 shares were divided equally between the first and second defendants, also directors.

The company was incorporated in 1938 and carried on a small light engineering business, which during the war enjoyed considerable prosperity. In recent years the company had, except in one year, made a loss. It had been kept going only because it had recovered excess profits tax and had reserves against taxation which were found not to be necessary for that purpose, and were brought back into the profit and loss account.

The balance sheet for the year ending May, 1951, showed a trading profit of £1,100 but a net loss of £352, which was due to the emoluments of the then two working directors, the first and second defendants. The plant and machinery, fixtures, fittings and motor vehicles appeared together in the balance sheet at £4,000, being cost less depreciation. The current liabilities were about equal to the current assets, the main liability being £1,300 due to the plaintiff's husband, and £800 to the plaintiff.

The company had adopted Table A of 1929 modified in certain respects.

Article 9 (*g*) of the company's articles, which was adopted in 1943, provided: "In the event of the death of any member "his shares shall be purchased and taken by the directors at such "price as is certified in writing by the auditor to be in his opinion "the fair value thereof at the date of death, and in so certifying "the auditor shall be considered to act as an expert and not as "an auditor and accordingly the Arbitration Act, 1889, shall not "apply. Unless otherwise agreed the directors shall take such "shares equally between them."

By a letter of December 6, 1951, a firm of chartered accountants stated that they had valued the shares of the company as required by article 9 (*g*), and that in their opinion "a fair value "for the purpose is £7 . . . per share."

By this action the plaintiff claimed against the other two directors of the company and against the company that the valuation was misconceived and erroneous, and had been made on an entirely wrong basis.

A preliminary point was taken on behalf of the defendants that the auditors' certificate was conclusive and binding on the plaintiff; and that as it was not wrong on the face of it, the court was not entitled to go behind the certificate and look at the reasons subsequently offered.

H. E. Francis for the plaintiff. The valuers proceeded on a wrong basis in making their valuation, in that they proceeded on the break-up value of the business. A valuation does not bind the parties where it has been made on a wrong principle. Moreover, the valuers have disclosed their reasons for their conclusions and the court is entitled to look at those reasons: *Johnston* v. *Chestergate Hat Manufacturing Co. Ld.*[1] The court will not enforce a valuation if it is based on a mistake or an improper or erroneous principle, or, in the absence of proof of any one of those things, if the price be so small as to be explainable only by reference to some such cause: *Collier* v. *Mason*[2] and Halsbury's Laws of England, 2nd ed., vol. 33, p. 361.

The valuers are required by article 9 (*g*) to fix a fair price, and, if they have proceeded on a wrong principle, it cannot be a fair price. The plaintiff must satisfy the court that the valuers have proceeded on a wrong basis, but in order to do that it is necessary to consider the valuation and the other documents.

D. S. Chetwood for the defendants. The certificate of valuation is final and conclusive and the court is not entitled to go behind it. In *Johnston* v. *Chestergate Hat Manufacturing Co. Ld.*[3] it was held that the court was not precluded from considering a certificate if it could be seen on the face of the certificate that it was wrong. There is nothing wrong on the face of the certificate here, and the court cannot go behind it to see if it is wrong: see also *Thomas* v. *Hamlyn & Co.*[4]; *Edwards* v. *Saunton Hotel Co. Ld.*[5]

The defendants' submission on the main issue will be that the valuers did not proceed on a wrong basis. On this point, however, it is submitted that the parties, having placed the matter in the hands of the valuers as directed by article 9 (*g*), are bound by their certificate, and there being nothing wrong on the face of it, they cannot now go behind the certificate and examine the valuers' reasons in order to show that it was made on a wrong basis.

HARMAN J. This is a preliminary point taken by the defendants. The plaintiff, as the personal representative of a member of this company, seeks to have reopened the valuation of certain shares in the defendant company held by her husband whom she now represents. There is an article which provides that if a member dies, his shares shall be purchased and taken by the directors at such price as is certified in writing by the auditor to be in his opinion the fair value at the date of death, and in so certifying the auditor shall be considered to act as an expert and not as an auditor. The auditors in this case issued a certificate on December 6, 1951, shortly after the member's death, in these terms: "As requested we have valued the shares in your com-"pany as at November 6 in accordance with the requirements of "article 9 (*g*). In our opinion a fair value for this purpose is £7 "a share," and they signed that statement.

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[1] [1915] 2 Ch. 338.

[2] (1858) 25 Beav. 200, 204.

[3] [1915] 2 Ch. 338.

[4] [1917] 1 K.B. 527; 33 T.L.R. 129.

[5] [1943] 1 All E.R. 176.

The plaintiff is dissatisfied with that value. Her husband held a controlling interest, being the registered holder of 140 out of the 200 shares in the company, and she apparently expected to get more than £7 each for them. Her solicitors took the matter up on her behalf and put a certain amount of pressure on the auditors to explain how they had arrived at the value. Eventually on February 12, 1952, the auditors wrote as follows: "We enclose a few notes which we have prepared to show you "how the points you raised at our discussion last week have been "allowed for in our valuation in so far as we considered them "appropriate. We trust that they will enable you to satisfy Mrs. "Dean [the plaintiff] that £7 a share represented a fair value."

When these notes are examined it appears that a certain basis of valuation has been taken, which the plaintiff says is fundamentally wrong. Whether that be so or not I have not yet considered; I do no more than assume that it might be proved to be wrong. Nevertheless, the point taken on behalf of the defendants is that the certificate is final and binding, and there being nothing wrong with the valuation on the face of the certificate it is not legitimate to go behind that certificate, and to look at explanations subsequently offered by the auditors out of kindness or consideration or the weakness of human nature, to show that they in fact proceeded on a wrong basis.

There is, in my judgment, nothing in that point. It is well settled that those who have a discretion, such as trustees who have powers to maintain and directors who have powers to admit members to a company, can maintain a silence which the court will not oblige them to break; and that if they do maintain that silence no action will lie against them; but if they choose, for whatever reason, to disclose the motives which impelled them to their decision, the plaintiff may come to the court to impeach those motives. It seems to me that that is analogous to what has happened here. It is true that the auditor was acting as an expert, and that he had to arrive at what was his opinion about the fair value. It may well be that his opinion, although wrong in the eyes of others may prevail; but if he has based himself on an entirely wrong basis and has chosen to explain that basis, I cannot see that the provisions of this article preclude the plaintiff from attacking it.

It was argued that the point is covered by authority, and the main case cited was *Johnston* v. *Chestergate Hat Manufacturing Co. Ld.*,[6] decided by Sargant J. That was a case about deducting income tax from profits before arriving at a commission; it was contended that, the certificate being based on a wrong principle, the court was not bound by it. The agreement was that as soon as the profits had been ascertained and certified by the company's auditors a certain percentage should be paid to the plaintiff. There was a definition of net profits for that purpose, and again a reference to a certificate by the auditors. Sargant J. said [7]: "In my "opinion, if I can see that a certificate is given on a wrong "principle, then I am not precluded by it from dealing with the "matter," and he continued: "The object of such a certificate "is to enable the auditors to deal with matters of account, and "so on; and here on the face of the balance sheet, and on the "face of the certificate, looking at the two together, it seems to "me quite clear that the auditors have proceeded upon a wrong "principle."

Sargant J. did not, therefore, confine himself to the certificate; he looked at the balance sheet on which it was based, and it does not seem to me that that case precludes me from looking at the documents other than the certificate or, indeed, other than the balance sheet which was before the auditors. I repeat; if they had chosen to keep silent, I do not think that any court would have obliged them to explain their reasons; but they have not been strong-minded enough to do that. It is therefore open to the plaintiff to question them, and the preliminary point does not succeed.

The case then proceeded to trial on the main issues.

H. E. Francis. The error here is as to the basis on which the valuation was made, that is, it was an error of principle. [He referred to *Queen* v. *Land Commissioners of England*.[8]] The principles which should have been adopted in the valuation of these shares was to value them as at November 6, 1951, on a sale in the open market between a willing seller and a willing buyer,

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[6] [1915] 2 Ch. 338.

[7] Ibid. 344.

[8] (1889) 23 Q.B.D. 59; 5 T.L.R. 263.

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the latter being willing to be registered as the holder of the shares on the footing that the business was a going concern: *Attorney-General of Ceylon* v. *Mackie.*[9] The valuer here made a fundamental error in using the break-up value; his whole approach was faulty; he thought that there was no prospect of the company ever making any profits in the future, and said that the only approach was therefore break-up value.

These shares represented the controlling interest in the company, and therefore the business could be sold as a going concern. The valuer merely thought of the business under the same management as before, and he failed entirely to consider the position of a hypothetical buyer who acquired a controlling interest in the business, and the use to which such a buyer might put it. The business had made a steady profit for some years, and there was no need to consider it solely from the angle of its break-up value. The plaintiff asks for a declaration that the valuation was wrong and not binding on the parties; an injunction to restrain the defendants from acting on it; and a declaration as to the basis on which the valuation should be made, and an inquiry directed on that footing. Whether or not the articles constitute a contract between the members, they regulate their rights inter se, and the court has power to order such an inquiry: *Parken* v. *Whitby*[10]; see also Palmer's Company Law, 19th ed., p. 28.

D. S. Chetwood. The valuer has not committed any error in principle. He attempted to value the property as a going concern, but he came to the conclusion, having regard to the company's trading results, that only a nominal value could be put on the shares on that footing, and that it was therefore necessary to consider the only other basis, that of the break-up value of the assets. It could not in the circumstances make any difference to his valuation which basis he adopted. If the valuer committed any error (it is not admitted that he did), it was only an error of judgment. The valuer did not make the valuation on the footing that the business was actually not a going concern, but on the footing that the shares would only be bought by persons, who would sell the assets over the counter the next day. If there were any error it was not one of principle but of judgment.

If the court should come to the conclusion that the valuation were wrong, it should not make a declaration as to the basis on which a valuation should be made or order an inquiry on that footing; that would be to put the court in the place of the person appointed by the parties under the articles, and there is no jurisdiction so to do.

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[9] [1952] 2 All E.R. 775.

[10] (1823) Tur. & Rus. 366.

Francis replied.

Harman J. This is an action of a rather singular kind, and arises out of articles which are very unusual in form. [His Lordship stated the facts substantially as set out above and continued:] That [article 9 (*g*)] is a very unusual type of article, because, instead of entitling the directors to take shares it is mandatory upon them to do so. Whether that is a right which the personal representative of the deceased member could enforce against the directors seems to me a matter of great doubt, but it is one which does not fall to me at this stage to determine. I see great difficulty in any such action, but it was assumed that the directors here—that is to say, the two defendants—would take these shares, and steps were immediately taken to that end. The auditors assumed the burden of certifying in writing their opinion as to their fair value.

On December 6, 1951, the auditors wrote to the directors, delivering what must be taken to be their certificate under article 9 (*g*). [His Lordship read the letter of December 6, 1951, as set out above and continued:]

The plaintiff was extremely dissatisfied with that valuation. She would, in my judgment, nevertheless have been powerless in the matter if the auditors had declined to expand their views. They should have remembered that silence is golden in a matter of this kind and that, short of fraud or dishonesty, which no one attributed to the auditors in this case, there was no way of questioning that certificate if the auditors declined to give reasons for the result at which they had arrived. It was their opinion. Opinions may differ, but the members of this company had committed themselves, maybe unwisely, to be bound by the opinion of the auditors; and, if those auditors gave an opinion which the members disliked or distrusted, so much the worse for them; they had made their bed and must lie on it. But, unfortunately for the defendants, the auditors did not keep quiet, and being pressed to explain how it was they arrived at what the plaintiff (who knew a good deal about this company, having acted as bookkeeper and being the owner of the factory where most of the business was carried on) thought was an incorrect valuation, they answered her solicitors on February 12, 1952, in the following letter: [His Lordship read the letter above set out.]

By way of preliminary point in this case, I was asked to hold that the court could not look at those points but was bound by the certificate which I have already read, and that, therefore, there was no cause of action. I held that that was not so, the case being analogous to the well-known cases where directors refuse to accept transfers when, as everyone knows, if they maintain silence no one can question their refusal if it is honest, but directly they give reasons, those reasons can be impeached. So here the court is entitled to look at, and the plaintiff is entitled to bring to the court's notice, the reasons which have been given and to criticize them as being bad.

At the head of the notes is: "Notes on valuation of shares "as on November 6, 1951." There is then set out at the top certain figures from the last balance sheet. They also set out what they call the trading results. That is not quite an accurate expression; they were not the trading results. The trading results had shown a profit in each of the last four years, but the profit and loss account in three of them had shown a loss after the deduction of the directors' remuneration. The notes continue: "In view of these trading results, and taking into account to "some extent the difficult position in which the company would "be placed if the amounts due to Mr. and Mrs. Dean had to be "paid, it was clear that no value could be put on the shares on "a normal going concern basis other than something purely "nominal. It became necessary, therefore, to consider the only "other basis which could apply; i.e., break-up value."

That is the core of the whole of the process through which the auditors have gone. The partner who attended to this matter went into the witness box and gave evidence very candidly, but with a lack of appreciation of what he was saying which was quite shocking. He adhered to the view that though, as will be seen, the physical assets of this company, if sold under the hammer at auction in a most disadvantageous way, would produce £7 a share, the shares were of no value at all if they were looked at on a going concern basis. This was, of course, idle nonsense, and, although it was pointed out to him several times that it was so, he nevertheless could not see it and adhered to his view. What he meant was that if he were advising a client who was going to buy a parcel of these shares, he would advise him not to buy them except at a nominal price because, in his view, the company's prospects were very poor.

It was true, of course, that a buyer of an interest (such as the 30 shares held by one of the defendant directors) in a private company which was making a loss was in an unhappy position as he would not get a dividend. But the auditor did not look at the substance of the matter, namely, that what was for sale was not 30 shares, or some small parcel of shares, but 140 shares, and the right to control the company. It had never occurred to him that it made any difference whether he was valuing a minority or a majority interest. He left that altogether out of his calculations, because he said: "This company ought to be wound up, in my "view, and, therefore, I shall treat it as having ceased business "the day Mr. Dean died and its physical assets as sold under the "hammer at the next auction sale that they can be taken to."

He instructed a well-known local valuer to value the machinery on that basis, and the latter said that he had valued the machines as so many loose chattels to be sold at auction, and that as some of the machines were old they had accordingly only scrap value. He added: "A valuation in situ would have "been higher, but I was not asked to value on that basis." That was the basis of his valuation, and it is not surprising to find that it produced a very low amount. It was given on November 23, and his report to the auditor was in these terms: "As requested, we have inspected the fast and loose plant and "machinery, office furniture and motor vehicles owned by the "above company, as per detailed inventory herewith, with a view "to giving you our opinion of what these articles would be likely "to realize if offered for sale by auction; i.e., their break-up "value," and he arrived at the figure of £1,785.

From that meagre sum the auditors took off about £300, being the amount of the depreciation on the defendants' own valuation of a large machine purchased by them and standing in the balance sheet at £400, and £100 or more for bad debts. Instead, therefore, of the value which the accounts had presented showing these assets at something like £4,000, they were treated as being worth £1,400, and, as there were 200 £1 shares, the auditors arrived at £7 a share as the value.

It is right to say that I was told in the course of the case that he had discovered subsequently that the debt due to the plaintiff was some £200 less than he had supposed. The value of the assets should therefore be raised by £1 a share, and he would now give £8 per share as the value.

In this sort of case a very small error will produce a very large difference. The view that this auditor took was this: "This company has been struggling and has not made much "profit." He said: "I do not think it ever will make a profit. "Therefore, the only thing to do is to close it down and to sell "its assets by auction next week." Mr. Chetwood, for the defendants, said that this might be right or it might be wrong, but at the worst it was only an error of judgment, and that those who committed themselves to the judgment of John Doe or Richard Roe cannot complain if either proves to have a very bad judgment. There is a good deal of force in that argument, but the answer is that this auditor did not merely get a valuation on a wrong basis—namely, break-up value, which I regard as the wrong basis—but he left out of account altogether the question of control. He told me that he would have valued a minority parcel on exactly the same lines as this one.

This company had made a trading profit for a number of years; there was no urgency to put an end to its life, it had no creditors who were threatening to destroy it, it had a factory, and it had machinery in that factory in situ, which was well maintained, apparently; and yet no inquiry of any sort was made whether the factory and machinery could not be sold as an entirety.

Evidence was given before me that at this time in Sheffield factory space was short, that trade in the light engineering world was good, and that, in the opinion of two of the witnesses, it was quite likely that someone could have been found to make a bid for the whole thing, lock, stock and barrel. No doubt it was not contemplated that this would happen; but, in fact, anybody who purchased these 140 shares was in a position to bring it about as soon as he chose. He could turn out the defendants, he could re-organize the factory and put in his own business, or he could sell the thing lock, stock and barrel. None of those possibilities was considered.

The auditor left the control factor out of account, as is evident from the notes which his firm wrote and more evident from his very candid evidence in the witness box. This seems to me to show that his valuation was altogether wrong. I do not doubt that this company had no goodwill, but the alternative to that was not to treat it as being closed down and in urgent need of having its assets sold under a forced sale. It can be sold as a going concern. That does not necessarily mean that, when so sold, the machinery will fetch more than the value of the assets in the balance sheet, but, of course, it all depends how that machinery is sold.

I have had evidence from a representative of one of the largest dealers in second-hand machinery in the country. He said that he had examined this machinery, and he valued it at £4,800, which was more than the balance sheet figure by some considerable amount, and he said that this was the value in his opinion of the machinery to anybody entering the factory to take it over.

Even if the assets were considered purely on the basis of their physical value, the price must be a very different price if sold on the footing that they are ready to operate tomorrow fixed in a factory, than if each piece is uprooted and put in an auction room. I was referred by Mr. Francis to *Attorney-General of Ceylon* v. *Mackie*,[11] which perhaps usefully illustrates this. That was a case in the Privy Council, concerning a question of estate duty under a Ceylon Ordinance, and the question was of valuing shares, much on the same lines as English shares are valued for English estate duty. There had been a dispute between the Crown and the taxpayer on the method of valuation and, although that point is not of any concern here, Lord Reid, at the end of his judgment, used these words[12]: "No doubt, "the value of an established business as a going concern generally "exceeds and often greatly exceeds the total value of its tangible "assets. But that cannot be assumed to be universally true. "If it is proved in a particular case that at the relevant date the "business could not have been sold for more than the value of "its tangible assets, then that must be taken to be its value as "a going concern."

In this case the result of the auditor's valuation was that he treated it as certainly being broken up tomorrow, and he treated the buyer as a person who would have no control over the fortunes of the business. In both those things he was wrong, and, in my judgment, the valuation cannot stand. I propose, therefore, to declare that the valuation is not binding upon the plaintiff and, if necessary—though I doubt if it can be necessary—to restrain the defendant company from acting upon the valuation.

The plaintiff asks the court to take upon itself the burden of ascertaining the value of the shares and to make a declaration of the basis on which the valuation should be made and then direct an inquiry on that footing. I decline to do either of those things. I do not see what jurisdiction the court has to put itself in the place of the expert that the parties have chosen. It may be that he would be unwilling to assume the burden of trying to do the same thing again, it may be that some agreement will be reached, and it may that if and when he does come to a new

[11] [1952] 2 All E.R. 775.

[12] Ibid. 779.

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decision one party or the other will refuse to carry it out. I do not propose to do any more at this stage than to relieve the plaintiff of any obligation that may be upon her to submit to the present valuation which could be implemented through the company, by the machinery which the articles provide, by the secretary signing the transfer of the shares.

Judgment for the plaintiff.

Solicitors: *J. R. Pullon, Walters & Co., for Elliott & Slater, Sheffield; Allen & Overy.*

I. G. R. M.

MORGAN (INSPECTOR OF TAXES) *v.* TATE & LYLE LD.

C. A.

1952
Nov. 18,
19, 20;
Dec. 18.

Harman J.

Singleton,
Jenkins and
Hodson L.JJ.

Revenue—Income tax—Deduction—Expenses wholly and exclusively for purposes of trade—Advertising to prevent nationalization of industry —Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I and II, r.* 3 (*a*).

A company engaged in sugar refining incurred expense in a propaganda campaign to oppose the threatened nationalization of the industry:—

Held, by Harman J. and the Court of Appeal (Singleton L.J. dissenting), that the expenditure was an expense wholly and exclusively laid out for the purposes of the company's trade within the meaning of rule 3 (*a*) of the Rules applicable to Cases I and II of Sch. D to the Income Tax Act, 1918, and was accordingly an admissible deduction from the company's profits for the purposes of income tax. On the facts as found, the expense was incurred because of a genuine belief that nationalization which would involve the loss to the company of its assets and business was imminent.

Principles in *Usher's Wiltshire Brewery Ld.* v. *Bruce* [1915] A.C. 433; (1914) 31 T.L.R. 104; *Union Cold Storage Co. Ld.* v. *Jones* (1923) 8 Tax Cas. 725, and *British Insulated and Helsby Cables Ld.* v. *Atherton* [1926] A.C. 205; (1925) 42 T.L.R. 187, applied.

Strong & Co. of Romsey Ld. v. *Woodifield* [1906] A.C. 448; 22 T.L.R. 754, considered.

Ward & Co. Ld. v. *New Zealand Commissioner of Taxes* [1923] A.C. 145; 39 T.L.R. 90, distinguished.

Singleton L.J. (dissenting): The expenditure was not wholly and exclusively for the purposes of the trade; it was not directed solely to maintaining the profit-earning capacity of the business, which would have presumably continued intact even if nationalized, but it was partly, at any rate, for the extraneous purpose of maintaining the stockholders' control of the business and preventing a change of ownership by government acquisition of the profits and assets of the company.

APPEAL by case stated from the Commissioners for the General Purposes of the Income Tax Acts for the City of London.

The following statement of facts is taken substantially from the judgments of Singleton and Jenkins L.JJ. at the hearing before the Court of Appeal: The respondent company, Tate & Lyle Ld., a company limited by shares incorporated on February 27, 1903, carried on an extensive sugar refining business, and was said in the case stated to refine about 53 per cent. of all the sugar refined in the United Kingdom. It held at all material times a controlling interest in three other British sugar companies, one operating in this country and the others in Jamaica and Trinidad respectively. It was also a member of the British Sugar Refiners' Association, an organization for protecting the trade interests of the industry.

During the years immediately following the political changes in 1945, the directors of the respondent company were becoming increasingly concerned by reason of statements, written and oral, made by supporters of the Labour Government, advocating the nationalization of the sugar industry. Amongst these was a pamphlet by Mr. Ian Mikardo, M.P., which stated (inter alia): "The products which most obviously suggest themselves for "transfer to publicly-owned production are margarine, flour, "sugar, bricks, shoe-machinery, cement and some specialized "chemicals." Early in 1949 it became evident to the board of directors from reports and articles appearing in the press that the Labour Party Executive was then discussing the question of including in the Labour Party's draft General Election programme a project for nationalizing the sugar refining industry. In April, 1949, the Labour Party Executive's statement on policy for discussion at the Party Conference at Blackpool at Whitsuntide, 1949, was issued under the title of "Labour Believes in Britain," which, according to the case stated, confirmed the directors' apprehensions.

That statement contained the following passage: "The Sugar "Monopoly. The privately-owned British Sugar Corporation "Ld., with a monopoly in sugar beet manufacture, was set up by "a Conservative Government. The legislation creating the "monopoly will expire early in the next Parliament. Labour "will not leave this monopoly in private ownership. Sugar "refining is also controlled by a State-protected private monopoly "which has enabled large profits to be made for private share- "holders. One concern dominates the British sugar industry; it "also has large interests in some of the colonial territories which "the Labour Government is pledged to develop. The sugar "industry is vital both in war and peace. Labour intends to "transfer to public ownership all the sugar manufacturing and "refining concerns."

On perusal of that publication the directors of the company became convinced that the nationalization of the sugar refining industry would become part of the Labour Party's official programme, and they were satisfied that the company was the "one "concern" referred to in the extract set out above. They decided to take every legitimate step to oppose it. In accordance with that decision Lord Lyle, the president of the respondent company, wrote in his capacity as chairman of the Sugar Refiners' Association a letter to Mr. Herbert Morrison, M.P., dated July 14, 1949, requesting that, before any final decision was reached to include in the Labour Party's election policy a proposal to nationalize the sugar industry, Mr. Morrison, as chairman of the Labour Party's committee on election policy, would agree to receive a small deputation from the association. That request was refused by a letter from the secretary of the policy committee. Efforts to obtain consent to the deputation having failed, the directors were more than ever convinced that nationalization of the industry was intended and that the company would thereby lose its business and assets.

Accordingly, an extraordinary meeting of the stockholders of the company was held on September 15, 1949, and Lord Lyle addressed the meeting. He said, inter alia: "The consumer "under free enterprise is protected against unjustified price "increases by the guarantees that refiners have given to Chancel- "lors of the Exchequer, by potential competition with foreign "white sugar and by the course open to manufacturers to conduct "their own refining operations. Where would these safeguards "be under a State monopoly? I do not hesitate to forecast that "they would all go by the board. Competition would no longer "keep a check on prices. Rising costs would be followed by a "cut in quality, a restriction of choice and a curtailment of "services to the consumer.

"The workers of your company enjoy the highest wages and "best working conditions in the industry. They have a pride in "the company which they serve, and we who are on the board "are proud to serve with them. Can you imagine that the same "spirit would exist under the remote control of bureaucracy? "I believe that with the standardization that goes hand in hand "with bureaucracy the best they can hope for is a standstill in "wages and working conditions while other sections of the "industry catch up.

"What is so disturbing, if I may be allowed for a moment to "take a wider view, is the effect that the nationalization of sugar "refining will have on other efficient industries. The undisclosed "motives for nationalizing sugar refining can apply equally to "any industry which is efficiently run and is making profits. "The managements of such companies will be subjected to a war "of nerves, and will be continually looking over their shoulders. "When will the nationalizers be wanting them? When will the "boys be looking for new jobs? When will their profits be "wanted to offset the growing losses of the industries nationalized "the year before? Some industries, to quote the planners, have "sinned by making 'a high profit.' When they begin to lose "millions a year of the taxpayers' money, doubtless the planners "will be satisfied and will then look about them for new victims.

"I have spoken at some length to ensure that you realize "what we are up against. You will appreciate from the way I "have spoken how important I consider it that the public should "be kept informed of the plans of the nationalizers. You will "have noticed that since they were given the 'all clear' at "Blackpool, they have made no further mention of their plans. "The last thing they want is for the public to know the facts. "It is plainly our duty to supply them."

At that meeting the following resolution was proposed and passed: "Believing as we do that nothing but harm to workers, "consumers and stockholders alike can spring from the "nationalization of the sugar refining industry, the members of "this company hereby empower the board of directors to do "everything in their power to meet the threats of the "nationalizers who, learning nothing from the chaos, losses and "labour unrest that they have created in other industries, now "wish to seize the assets of this company. . . ."

On March 31, 1949 (before the Labour Party conference at Blackpool), the respondent company entered into an agreement with a company called Aims of Industry Ld., whereby, after reciting that the company was desirous of fostering and promoting the industry of sugar refining with the ultimate view of the preservation and extension of the goodwill of the company's business, Aims of Industry Ld. was appointed the company's public relations officer and advertising agent for a period of five years at a fee of £5,000 per annum; Aims of Industry Ld. undertook to use its best endeavours to promote the interests of the industry generally, and to that end to seek to extend the knowledge and information of the public generally "in relation "to the said industry . . . and its relation to the national "economy," with a proviso to the effect that nothing contained in the agreement should be deemed to impose on Aims of Industry Ld. any obligation to advertise the company other than as a member of the said industry; and it was also agreed that the company should place to the credit of a joint account at a specified bank a sum of £75,000 for the purpose of meeting all expenditure recommended by Aims of Industry Ld. and approved by the company for furthering the aims and objects of the agreement.

In fulfilment of the obligation imposed on them by the resolution of September 15, 1949, the directors decided to intensify their anti-nationalization propaganda campaign, which was of national dimensions and which was in the hands of Aims of Industry Ld., in order to try to preserve intact the business and assets of the company.

During the company's accounting year up to October 1, 1949, Aims of Industry Ld. expended £29,398 5s. 0d. out of the £75,000 deposited with them. That sum of £29,398 5s. 0d. was entered in the company's profit and loss account for the 52 weeks ended October 1, 1949, being included in an item of £42,183 for "advertising (including anti-nationalization campaign)," and it was also shown in the company's detailed accounts ("schedule of "expenses") as submitted to the inspector of taxes under the heading "central administration. Aims of Industry, London." The activities of Aims of Industry Ld. during the accounting period in question included advertising, film making, film showing, the issue of pamphlets and ration-book holders (suitably inscribed), photography, recordings, etc. A document was produced by the respondent company headed "Aims of Industry Ld. "—joint account expenses—year ended September 29, 1949," which contained details of the expenditure of the sum of £29,398 5s. 0d. on those various activities for the year ended September, 1949, and provided a summary of such expenditure with a suggested allocation between "general adver-

"tising," £11,508 4s. 10d., "anti-nationalization (specific)," £15,339 15s. 2d., and "general expenses," £2,550 5s. 0d.

The company claimed that the whole of that sum, namely, £29,398 5s. 0d., should be deducted in arriving at the balance of profits for the accounting period. The inspector of taxes contended that that part of the expenditure incurred on "anti-"nationalization (specific)," that is, £15,339 15s. 2d., was not a proper deduction. No issue was raised as to correctness of the company's apportionment of the expenditure, as it was agreed that the exact amount to be regarded as properly attributable to anti-nationalization could, if necessary, be settled by negotiation once the question of principle had been decided.

At the hearing before the commissioners evidence was given on behalf of Tate & Lyle Ld., and accepted by the commissioners, by Lord Lyle, by Mr. Booth, director and secretary of the company, and by a member of the firm of auditors of the company. Lord Lyle said that he had been a director of the company for 40 years and that he was intimately acquainted with the whole of the sugar refining industry. The directors thought that if nationalization occurred the State would take over the company's assets and its business, as, it was stated in the case before the commissioners, had in fact already been done, at the date when the company decided to embark on the propaganda campaign, in the case of the coal, railway, gas and electricity industries, where nationalization broadly took the form of the compulsory acquisition of the respective businesses in return for compensation, usually by way of government stock.

Lord Lyle said that the directors decided to take such legal steps as they could to prevent the anticipated acquisition. The primary object of the propaganda campaign was to prevent the company from losing its business and to preserve its assets intact. He agreed that if the company lost its business, the stockholders would also suffer, and that the preservation of the company's business would, incidentally, save the stockholders from injury as well. The directors' intention was to protect the company; in so doing, no doubt, they protected the stockholders also; it would be their duty to protect them as well. He had never thought of the alternative method of nationalization by which the State would have acquired all the capital stock of the company from its members. The method which was adopted in the cases of the Bank of England and Cable and Wireless Ld. had been the compulsory transfer of the shares or stock forming the capital of the companies to nominees of the Treasury or to a public body, a method also adopted by the Iron and Steel Act, 1949, as foreshadowed at the material time by the Iron and Steel Bill, which had received its second reading in the House of Commons in November, 1948.

Mr. Booth said that much of the propaganda employed in the campaign was directed towards defending the industry as a whole, although the whole of the expenditure was incurred by the company. It would have been no use having a propaganda campaign to prevent the company alone being nationalized; only by campaigning against the nationalization of the industry as a whole would the company's own business be saved. Aims of Industry Ld. were looking after the company's interests through the industry as a whole. It did occur to him that one way of nationalizing the company would be for the State to acquire all the capital stock, but they had no right to assume which form nationalization would take. There was a danger that it would take various forms, but they could only assume the worst and do their best to protect their own business. They were anxious to prevent nationalization from taking place in any form.

The auditor, a Mr. Nicholson, said that, in accordance with ordinary commercial accountancy practice, the expenditure of £29,398 5s. 0d. would have to be charged against the profit to which it related, for any item of expenditure which did not produce a capital asset had to be so charged.

The commissioners found that the expenditure of £15,339 15s. 2d. on anti-nationalization was money wholly and exclusively laid out for the purposes of the company's trade and was an admissible deduction from the profits for income tax purposes under rule 3 (*a*) of Cases I and II of Sch. D to the Income Tax Act, 1918.[1]

Sir Reginald Manningham-Buller S.-G. and *Sir Reginald Hills* for the Crown. This expenditure, however desirable in the interests of the stockholders and the workers in the industry, was not money laid out wholly and exclusively for the purposes of the respondents' trade, but to prevent the seizure of their business. It was expenditure on the battle between the State and private enterprise, and it was therefore expenditure in the interest of the industry as a whole, and not exclusively for the trade of the respondents within the meaning of rule 3 (*a*), since other persons would be benefited. It is not suggested that expenses for a political purpose can never be deducted: see *Smith* v. *Incorporated Council of Law Reporting.*[2]

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[1] Income Tax Act, 1918, Sch. D, Cases I and II, r. 3 (*a*): "In computing the amount of the profits or "gains to be charged, no sum shall "be deducted in respect of (*a*) any "disbursements or expenses, not being "money wholly and exclusively laid "out or expended for the purposes of "the trade. . . ."

Nationalization of industry has taken place by two main methods. The first is to purchase all the assets and to distribute government stock among the shareholders; if that method were to be adopted here, this would be merely the cost of a campaign to decide who should earn the profits. The second method is to purchase all the shares, leaving the companies intact but controlled by the Government or its nominee, in which case the expenditure would be for the protection of the shareholders and not the trade.

The question whether an expense is deductible under rule 3 (*a*) was held in *Smith* v. *Incorporated Council of Law Reporting*[2] to be a question of fact: see also *Cooke* v. *Quick Shoe Repair Service.*[3] More recently it has been regarded as a question of law: see *Union Cold Storage Co. Ld.* v. *Jones*[4] and *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*[5]

Rule 3 (*a*) has been considered in a large number of cases. In *Rhymney Iron Co.* v. *Fowler,*[6] contributions to an association of coal owners as an indemnity against strikes was held not deductible: see also *Lochgelly Iron and Coal Co. Ld.* v. *Crawford.*[7] The authorities show that to come within rule 3 (*a*) the expenditure must be for the purpose of earning profits. In *Strong & Co. of Romsey Ld.* v. *Woodifield*[8] Lord Davey said[9] that it was not enough that the disbursement was in the course of or arose out of or was connected with the trade, but that it must also be for the purpose of earning profits: see also *Watson* v. *Royal Insurance Co. Ld.*[10] and *Smith's Potato Estates Ld.* v. *Bolland.*[11] The nearest case to the present one is *Ward & Co. Ld.* v. *New Zealand Commissioner of Taxes,*[12] where the Privy Council held that expenditure by a brewery on anti-prohibitionist propaganda was not deductible. Although that case is not binding on this court, it is submitted that it should be followed.

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[2] [1914] 3 K.B. 674, 684; 30 T.L.R. 588; 6 T.C. 477.

[3] (1949) 30 T.C. 460.

[4] (1923) 8 T.C. 725.

[5] [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

[6] [1896] 2 Q.B. 79; 12 T.L.R. 404.

[7] (1913) 6 T.C. 267.

[8] [1906] A.C. 448; 22 T.L.R. 754; 5 T.C. 215.

[9] [1906] A.C. 448, 453.

[10] [1896] 1 Q.B. 41; 12 T.L.R. 52.

[11] [1948] A.C. 508; 64 T.L.R. 430; [1948] 2 All E.R. 367.

[12] [1923] A.C. 145; 39 T.L.R. 90.

Even if this expenditure were for the purposes of the trade, it is a capital and not an income expenditure. In *Associated Portland Cement Manufacturers Ld.* v. *Kerr* [13] it was held that a payment which added to the permanent value of the goodwill of a business was a capital payment. A capital expenditure has been called a " once and for all payment," but in *British Insulated and Helsby Cables Ld.* v. *Atherton* [14] Lord Cave said that that, although a material consideration, was never intended to be a decisive factor in all cases.[15]

[Counsel also referred to *Moore (A. G.) & Co.* v. *Hare* [16] and *City of London Contract Corporation* v. *Styles*.[17]]

Money spent on buying a new business cannot be a trade expenditure, and similarly money spent on resisting compulsory acquisition cannot be within rule 3 (*a*); it is merely expenditure to prevent change of ownership.

Sir Reginald Hills followed.

J. Millard Tucker Q.C., *Roy Borneman Q.C.* and *Desmond Miller* for Tate & Lyle Ld. In consideration of the question whether this is a question of fact or law, it is generally accepted that once the facts are found and the necessary inferences of fact from those facts, the question becomes a pure question of law. The commissioners are the judges of fact and any inferences of fact from those primary facts.

The first question of fact for the commissioners to decide was what was the motive of the expenditure, and they have decided that it was to prevent nationalization of the respondents' business, that is, acquisition by the State of the company's business as a business. It is submitted that that decision is in favour of the respondents, but, even if there were a dual purpose expenditure, it would still be within the rule. The position was that the Government, seeing a flourishing business, decided to take it. The respondents did not wish that to happen, and ridiculed it. On that basis *Mitchell* v. *B. W. Noble Ld.*[18] is authority that this is a trade expense.

Ward & Co. Ld. v. *New Zealand Commissioner of Taxes* [19] was concerned with an Act which was different from the English law. If English law had been in force in New Zealand that decision

[13] (1945) 62 T.L.R. 115; [1946] 1 All E.R. 68; 27 T.C. 103.

[14] [1926] A.C. 205; 42 T.L.R. 187.

[15] [1926] A.C. 205, 212.

[16] (1914) 6 T.C. 572.

[17] (1887) 4 T.L.R. 51; 2 T.C. 239.

[18] [1927] 1 K.B. 719; 43 T.L.R. 245.

[19] [1923] A.C. 145.

could not have been given. It is, moreover, a Privy Council decision and not, therefore, binding on this court.

It was an alternative plea that this was a capital expenditure; the cases cited do not help in the present case; the expenses in those cases were obviously of a capital nature.

It was conceded that the mere fact that some political interest exists is not inimical to the respondents' contention. [Counsel referred to *Smith* v. *Incorporated Council of Law Reporting*[20] and *McGarry* v. *Limerick Gas Committee*.[21]]

The contention that the expenditure was not within rule 3 (*a*) because a campaign against the nationalization of the sugar industry as a whole would involve helping third parties is not maintainable; the fact that such expenditure may help third parties does not prevent it coming within rule 3 (*a*): see *Usher's Wiltshire Brewery Ld.* v. *Bruce*.[22]

It was contended that this was expenditure to decide who should have the right to carry on the business, but that comes exactly within the principle laid down by Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield*[23]—enabling a person to carry on and earn profits in the trade[24]—it is money spent for the sole purpose of enabling the company to carry on the trade itself. It is expenditure to preserve the company's business: see *Southern* v. *Borax Consolidated Ld.*[25] Expenditure for the purpose of preserving the respondents' business is a trade expense and not a capital one, just as much as a premium for a burglar insurance or fire insurance is a trade expense; the case falls fairly and squarely within *Mitchell* v. *B. W. Noble Ld.*[26]

Borneman followed.

Sir Reginald Manningham-Buller in reply. It has been sought to distinguish *Ward & Co. Ld.* v. *New Zealand Commissioner of Taxes*[27] on the ground of the difference between the New Zealand statute and the English law; but the reasoning in that case is applicable to this case. The principal points of distinction are of very minor importance. The words of both statutes are similar. In the English cases the interpretation by the courts is that the expenditure must be laid out for the purpose of earning profits; that is similar to the words used in *Ward & Co. Ld.* v. *New Zealand Commissioner of Taxes*.[27]

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[20] [1914] 3 K.B. 674, 684.

[21] [1932] Ir.R. 125.

[22] [1915] A.C. 433, 444, 445; 31 T.L.R. 104; 6 T.C. 399.

[23] [1906] A.C. 448.

[24] [1906] A.C. 453.

[25] [1941] 1 K.B. 111; [1940] 4 All E.R. 412.

[26] [1927] 1 K.B. 719.

[27] [1923] A.C. 145.

The purpose of both statutes is the same; the expenditure must be for the production of income; here it is to prevent the extinction of the business. This case is relied on for the reasoning in it, although it cannot be relied on as an authority. Here it is not the carrying on of the trade which is concerned, but the change of ownership.

Cur. adv. vult.

1952. December 18. HARMAN J., reading his judgment:— The question on this appeal has a certain spurious interest derived from the fact that a political colour attended the activities on which the money in question was expended. These consisted of an advertising campaign whose object was to set the public mind against the then Government's proposal to nationalize the sugar refining industry. The standard bearer in the campaign was, it appears, an invented figure styled "Mr. Cube," whose antics and comments achieved notoriety because they appeared on the containers of sugar purchased weekly by consumers up and down the country and were, I suppose, applauded or execrated according to the political sentiments of the beholder. He became, according to the Solicitor-General, a well-known figure in political circles. This type of political flavour is bound to creep in where the State takes as large a part as it now does in the commercial activities of the country; but I desire to say at the outset that this case has nothing to do with politics or with the political feelings of those who were responsible for the activities in question; nor is it concerned with the views on nationalization of this or any other industry from time to time prevailing at Westminster. It is simply another instance of a familiar type of case where a taxpayer claims and the Crown denies the propriety of a deduction from profits under rule 3 (*a*) of Cases I and II of Sch. D.

[His Lordship stated the facts and continued:] The first point taken for the Crown before the commissioners was that this expenditure was concerned with the sugar refining industry as a whole and was not confined to the respondents' own concern. There is in my judgment nothing in this point. It was clear that a campaign of this sort could not be conducted in favour of one concern in the industry and that the only way to protect the respondents was to protect their competitors along with them. Therefore the fact that the whole industry was included did not make the money the less laid out exclusively for the purposes of the respondents' trade.

The second and third points taken for the Crown were based on the suggestion that there have been employed as a means to the so-called nationalization of industry two main methods, the first of which consists in the purchase of the assets of all the concerns in the trade, leaving them with nothing but government stock to distribute among their shareholders; the second by acquiring the shares of all the shareholders in concerns interested in the trade, leaving the companies intact but entirely controlled by the Government or its nominee. It was apparently argued that if the first of these devices were employed the expenditure incurred in combating it was the cost of conducting a campaign to decide who should earn the profits, while if it was the second the expenditure was for the protection of the stockholders and not of the company's trade. This, in my judgment, is a false point. I cannot see that it makes any difference to a shareholder in a company which is to be nationalized whether he acquires the government stock which is his compensation direct from a body which purchases his shares or indirectly on a liquidation of the company. In either event he ceases to have any interest in the industry. I cannot believe that this case turns on the question what form nationalization might have taken in the case of this industry.

Before me the point taken on the Crown's behalf was that this expenditure was expenditure connected with the ownership and not the conduct of the business, or alternatively, that the expenditure, even though laid out wholly for the purposes of the trade, was of a capital nature. This last point was not raised before the commissioners, and it was urged upon me that the Crown ought not to be allowed to raise it now. For reasons which I shall give, I think that the point is a bad one, and I need not decide whether the Crown was at liberty to raise it here.

There are no disputed facts in the case. It must be taken as admitted or agreed that the expenditure in question was undertaken to prevent the confiscation of the business by means of nationalization. It is, I think, clear, and must have been clear to the commissioners, that the general body of the shareholders who passed the resolution to which I have referred did not consider what form nationalization might take, and did not care. All that they wanted was to prevent the business from being taken from the hands of those then conducting it. The so-called campaign conducted by Aims of Industry Ld. in conjunction with the respondents had the same object; and I see no reason to suppose that the respondents through their board did not consider

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that it was, in the words of the resolution, intended to combat "the harm to workers, consumers and stockholders alike" believed to be likely to ensue from nationalization. Nor do I doubt that the objects of the campaign were considered to be within the recital in the agreement of March 31, 1949, as being "with the ultimate view to the preservation and extension of the "goodwill of the business."

Whether right or wrong, with these facts before them, the commissioners found that the money was wholly laid out for the purposes of the respondents' trade, and the first question to be determined is whether that is a finding of fact; for, if it is, it seems to me that there was ample evidence before the commissioners on which they could so find.

Before I consider this I will refer to the statute. The profits of the respondents are taxable under Sch. D (1) (ii) of the Income Tax Act, 1918, and the rule in question is rule 3, which is in a negative form: "No sum shall be deducted in respect of (*a*) any "disbursements or expenses, not being money wholly and exclu- "sively laid out or expended for the purposes of the trade." Scrutton J., in *Smith* v. *Incorporated Council of Law Reporting*,[1] was of opinion that the question whether money was so laid out is a question of fact. Rowlatt J., however, in *Union Cold Storage Co. Ld.* v. *Jones*,[2] was of opinion that whether expenses were "too remote from the business of the appellant company" was not a question of fact. Croom-Johnson J., in *Cooke* v. *Quick Shoe Repair Service*,[3] was of opinion that if the expense was of a kind which could be included in the phrase then it was a question of fact whether it was so included. In this sense no one will doubt that the question is one of fact. It seems to me, however, that the question whether an expenditure whose object is known is capable upon the true construction of the Act of coming within its words must be a question of law, and for this I have the recent authority of Lord Reid and Lord Radcliffe in *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*[4]: see the speech of Lord Reid,[5] and that of Lord Radcliffe [6] where he expresses the opinion that the commissioners made an error of law in expressing an opinion analogous to that expressed here. It is therefore, in my opinion, for the court to consider whether, the facts being admitted, the expenditure upon a true construction of the rule is within it.

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[1] [1914] 3 K.B. 674; 30 T.L.R. 588; 6 T.C. 477.

[2] 8 T.C. 725, 736.

[3] 30 T.C. 460.

[4] [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

[5] [1952] 1 T.L.R. 565.

[6] Ibid. 573.

This rule has many times been before the courts and has been much glossed on by the judges who have had the difficult task of applying it to multifarious circumstances occurring from time to time. In one of the earliest cases, *Rhymney Iron Co. Ld.* v. *Fowler*,[7] Pollock B. deprecated the addition of a gloss, saying that the words themselves were sufficient. In that case he held that payments made to an indemnity fund were not within the rule. Notwithstanding this warning, attempts have been made ever since to illustrate the rule by way of gloss. The most celebrated is that of Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield*,[8] a case where the House of Lords declined to allow under this rule the deduction of a sum paid by a brewery company as damages for negligence of one of its servants. He said[9]: "These words . . . appear to me to mean for the "purpose of enabling a person to carry on and earn profits in "the trade." Rowlatt J., in his judgment in *Union Cold Storage Co. Ld.* v. *Jones*,[10] said that the expenditure must be intended to "bring grist to the mill." Lord Porter in *Smith's Potato Estates Ld.* v. *Bolland*,[11] paraphrasing Lord Selborne in *Mersey Docks and Harbour Board* v. *Lucas*,[12] said that the expense must be "incurred in order to earn any gain." There are no doubt a number of other attempts to illustrate the rule. Perhaps the last word on the subject was contained in Lord Porter's speech above referred to, where after a reference to Lord Davey's definition he said[13]: "My Lords, that expression has "often been referred to and approved, but it was used in reference "to the circumstances of the case then under consideration and I "doubt if it carries the matter to a final conclusion. It still "leaves open the question what expense is incurred for the "purpose of enabling a trader to earn profits and the adoption of "a phrase helpful in analysing the meaning of words in an Act of "Parliament with reference to a particular set of circumstances "is not necessarily either useful or conclusive in all cases. It is "probably safer to retain the wording of the Act itself and, by "applying it to the facts established, to discover whether the "deduction falls within its terms or not."

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[7] [1896] 2 Q.B. 79; 12 T.L.R. 404; 3 T.C. 476.

[8] [1906] A.C. 448; 22 T.L.R. 754; 5 T.C. 215.

[9] [1906] A.C. 448, 453.

[10] 8 T.C. 725.

[11] [1948] A.C. 508; 64 T.L.R. 430; [1948] 2 All E.R. 367.

[12] (1883) 8 App.Cas. 891, 906.

[13] [1948] A.C. 508, 520.

This seems to me to be admirable counsel, and enjoins me to stick to the words "for the purposes of the trade." I have had a great number of cases cited to me which are no more than illustrations of various sets of circumstances under which the court held, or did not hold, that the expenditure came within the words, and I shall be excused if I do not refer to them, for I cannot think that what was decided in other circumstances can be of much help to me in these, which have not occurred before, and which for aught I know may never occur again.

Before grappling with this difficulty, I had better express my views about the point whether this was a capital expenditure. In my judgment, it clearly was not. Instances were cited to me where expenditure was held to be of a capital nature, for instance, *Moore (A. G.) & Co.* v. *Hare*,[14] where a company promoted a bill to empower the building of a private railway. This seems a clear enough case; the new railway and the bill to promote it would produce a new asset of the company of a permanent nature. Similarly, in *City of London Contract Corporation Ld.* v. *Styles*,[15] the performance of incompleted contracts as part of the price for taking over a business was clearly an expense designed to increase the permanent assets. So, too, in *Associated Portland Cement Manufacturers Ld.* v. *Kerr*,[16] the payment of £30,000 to obtain certain restrictive covenants from directors was held to be an attempt to add to the permanent value of the company's goodwill. The present seems to me to have been on ordinary accounting principles an income expense which would rank with other advertising expenses but for the singularity of its object. This point was considered by Lord Cave L.C. in his speech in *British Insulated and Helsby Cables Ld.* v. *Atherton* [17] in these terms [18]: "But there remains the question, which I have found "more difficult, whether, apart from the express prohibitions, "the sum in question is (in the words used by Lord Sumner in "*Usher's Wiltshire Brewery Ld.* v. *Bruce* [19]) a proper debit item "to be charged against incomings of the trade when computing "the profits of it; or, in other words, whether it is in substance "a revenue or a capital expenditure. This appears to me to be "a question of fact which is proper to be decided by the com"missioners upon the evidence brought before them in each case; "but where, as in the present case, there is no express finding

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[14] 6 T.C. 572.

[15] 4 T.L.R. 51; 2 T.C. 239.

[16] (1945) 62 T.L.R. 115; [1946] 1 All E.R. 68; 27 T.C. 103.

[17] [1926] A.C. 205; 42 T.L.R. 187; 10 T.C. 155.

[18] [1926] A.C. 205, 212.

[19] [1915] A.C. 433; 31 T.L.R. 104.

"by the commissioners upon the point, it must be determined "by the courts upon the materials which are available and with "due regard to the principles which have been laid down in "the authorities. Now, in *Vallambrosa Rubber Co. Ld.* v. "*Farmer*,[20] Lord Dunedin, as Lord President of the Court of "Session, expressed the opinion that 'in a rough way' it was "'not a bad criterion of what is capital expenditure—as against "'what is income expenditure—to say that capital expenditure "'is a thing that is going to be spent once and for all, and "'income expenditure is a thing which is going to recur every "'year'; and no doubt this is often a material consideration. "But the criterion suggested is not, and was obviously not "intended by Lord Dunedin to be, a decisive one in every case; "for it is easy to imagine many cases in which a payment, "though made 'once and for all,' would be properly chargeable "against the receipts for the year. Instances of such payments "may be found in the gratuity of £1,500 paid to a reporter "on his retirement, which was the subject of the decision in "*Smith* v. *Incorporated Council of Law Reporting*,[21] and in the "expenditure of £4,994 in the purchase of an annuity for the "benefit of an actuary who had retired, which, in *Hancock* v. "*General Reversionary and Investment Co. Ld.*,[22] was allowed, "and I think rightly allowed, to be deducted from profits. But "when an expenditure is made, not only once and for all, but "with a view to bringing into existence an asset or an advantage "for the enduring benefit of a trade, I think that there is very "good reason (in the absence of special circumstances leading "to an opposite conclusion) for treating such an expenditure "as properly attributable not to revenue but to capital." This expense has none of the characteristics of capital payments there adverted to and was, in my judgment, an income expense.

Turning now to the main difficulty, I may cite again from *British Insulated and Helsby Cables Ld.* v. *Atherton*,[23] where Lord Cave L.C. said this in connexion with the deduction there in question[24]: "My Lords, I think it clear that the deduction "from the profits of the above-mentioned sum of £31,784 is "not prohibited by the first rule applicable to Cases I and II, "which prohibits the deduction of a disbursement not being "money wholly and exclusively laid out or expended for the

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[20] 1910 S.C. 519; 5 T.C. 529.

[21] [1914] 3 K.B. 674; 30 T.L.R. 588.

[22] [1919] 1 K.B. 25; 35 T.L.R. 11.

[23] [1926] A.C. 205.

[24] Ibid. 211.

"purposes of the trade. It was made clear in the above cited "cases of *Usher's Wiltshire Brewery Ld.* v. *Bruce*[25] and "*Smith* v. *Incorporated Council of Law Reporting*[26] that a sum "of money expended, not of necessity and with a view to a direct "and immediate benefit to the trade, but voluntarily and on the "grounds of commercial expediency, and in order indirectly to "facilitate the carrying on of the business, may yet be expended "wholly and exclusively for the purposes of the trade; and it "appears to me that the findings of the commissioners in the "present case bring the payment in question within that description. They found (in words which I have already quoted) that "the payment was made for the sound commercial purpose of "enabling the company to retain the services of existing and "future members of their staff and of increasing the efficiency "of the staff; and after referring to the contention of the Crown "that the sum of £31,784 was not money wholly and exclusively "laid out for the purposes of the trade under the rule above "referred to, they found that the deduction was admissible— "thus in effect, although not in terms, negativing the Crown's "contention."

It is urged by the respondents that those words of Lord Cave exactly cover what was done in this case. The respondents further relied on the decision of *Mitchell* v. *B. W. Noble Ld.*,[27] where the court allowed deduction of a sum paid to a retiring director in very peculiar circumstances described by Sargant L.J. in these terms[28]: "Now, first, as to the question whether this "was a disbursement wholly and exclusively laid out or expended "for the purposes of the trade, it seems to me that there is "nothing at all to show that it was not so exclusively laid out. "The object, as disclosed by paragraph 9 of the case, was that of "preserving the status and reputation of the company, which "the directors felt would be somewhat imperilled by the other "director remaining in the business or by a dismissal of him "against his will, involving proceedings by way of action in "which the good name of the company might suffer. To avoid "that and to preserve the status and dividend earning power of "the company seems to me a purpose which is well within the "ordinary purposes of the trade, profession or vocation of the "company."

It was the respondents' case that this sum of money was an income expense as in the last cited case, and not a capital expense as in *British Insulated and Helsby Cables Ld.* v. *Atherton*,[29] but was within the words used by Lord Cave and Sargant L.J. in describing an expense laid out wholly and exclusively for the purposes of the trade of the company.

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[25] [1915] A.C. 433.

[26] [1914] 3 K.B. 674.

[27] [1927] 1 K.B. 719; 43 T.L.R. 245; 11 T.C. 372.

[28] [1927] 1 K.B. 719, 738.

The Crown relied particularly on a decision of the Privy Council, *Ward & Co. Ld.* v. *New Zealand Commissioner of Taxes*.[30] This case is the only one in which the circumstances bear any resemblance to the instant case. The expense there in question was incurred by a brewery company in financing a campaign to persuade the public to vote against "prohibition" in a forthcoming plebiscite. It is true that the result of prohibition would have been not to transfer the industry to the State but to destroy it altogether, but nevertheless there is a likeness between the two sets of circumstances, and the Court of Appeal in New Zealand and the Judicial Committee used phrases which at first sight at any rate are pertinent to the present case. I find this passage [31]: "The conclusion of the Court of Appeal upon this "point is contained in the following passage in the judgment of "that court: 'The question, therefore, is: Was the expenditure "'under consideration exclusively incurred in the production of "'the assessable income, for unless it was so, the Act expressly "'prohibits its deduction from such income. This question "'must, we think, be answered in the negative. We find it "'quite impossible to hold that the expenditure was incurred "'exclusively, or at all, in the production of the assessable "'income. It was incurred not for the production of income, but "'for the purpose of preventing the extinction of the business "'from which the income was derived, which is quite a different "'thing. It was contended by the company that it was illogical "'that while legitimate expenses incurred in the production of "'the income are deductible, similar expenses incurred for the "'much more important purpose of keeping the profit-making "'business alive are not deductible, and, further, that it was "'inequitable that the legislature should, on the one hand, force "'a certain class of traders into a struggle for their very "'existence, and, on the other hand, treat the reasonable "'expenses incurred in connexion with such struggle as part of "'the profits assessable to income tax. These aspects of the "'matter are clearly and forcibly set out in the contentions "'of the company as embodied in the correspondence with the

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[29] [1926] A.C. 205.

[30] [1923] A.C. 145; 39 T.L.R. 90.

[31] [1923] A.C. 145, 149.

" 'commissioner contained in the case, but they raise questions " 'which can only be dealt with appropriately by the legislature. " 'This court, however, cannot be influenced by such considera- " 'tions, being concerned only with the interpretation and " 'application of the law as it stands.'

" Their Lordships agree with this reasoning. The expenditure " in question was not necessary for the production of profit, nor " was it in fact incurred for that purpose. It was a voluntary " expense incurred with a view to influencing public opinion " against taking a step which would have depreciated and partly " destroyed the profit-bearing thing. The expense may have " been wisely undertaken, and may properly find a place, either " in the balance sheet or in the profit-and-loss account of the " appellants; but this is not enough to take it out of the " prohibition in section 86 (1) (*a*) of the Act. For that purpose " it must have been incurred for the direct purpose of producing " profits. The conclusion may appear to bear hardly upon the " appellants; but, if so, a remedy must be found in an amend- " ment of the law, the terms of which are reasonably clear.

" It is only necessary to add that the decisions on the English " Income Tax Acts, the language of which is different from that " of the New Zealand Act, have no real bearing upon the question " now under decision."

It is to be observed that the Board, which included Lord Cave, Lord Atkinson and Lord Sumner among its members, having had a number of English cases cited to it, was careful to say that the English decisions had no bearing on the question owing to the difference in language, the words of the New Zealand Act being " exclusively incurred in the production of the assessable " income," assessable meaning income to which the subject could be assessed to tax. The Board, moreover, stated that there the expenditure must have been incurred " for the direct purpose " of producing profits," and with this may be contrasted Lord Cave's statement in *British Insulated and Helsby Cables Ld.* v. *Atherton*,[32] " in order indirectly to facilitate the carrying on of " the business." In my judgment, therefore, this case has no real bearing on the present one.

There remains the Crown's main contention, which was that the object of this campaign was not to maintain or increase the goodwill or profits, but to decide who should earn them. This, as it seems to me, covers too much ground. When analysed, it

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[32] [1926] A.C. 205, 212.

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will be seen that all advertising is concerned with this struggle. If my goods do not appeal to the public and my competitor's do, he and not I will earn the profits which are to be made by selling the class of article which I have to offer. I, therefore, institute an advertising campaign with the object of belauding my goods and dispraising his: my design is that customers shall resort to my shop and not to his when they require the article in question. So here, the consumer is to be persuaded that he (or she) will get more or better or cheaper sugar by allowing the trade to be controlled by the respondents and their rivals than by entrusting it to the hands of the pundits in Whitehall. It is conceded that the expense of a campaign of the former sort would be allowable; and rightly, for the money is laid out for the purposes of the trade. Equally so, in my judgment, is money spent on the latter object. There was nothing to show that this campaign did not in fact increase the goodwill and reputation of the respondents in the eyes of the public, as it was intended to do.

Accordingly, I am of opinion that the commissioners came to a right conclusion, and I dismiss the appeal.

The inspector of taxes appealed.

C. A.

1953 *Mar.* 18, 19, 20; *May* 6.

Singleton, Jenkins and Hodson L.JJ.

Sir Reginald Manningham-Buller S.-G. and *Sir Reginald Hills* for the Crown.

J. Millard Tucker Q.C., *Roy Borneman Q.C.* and *Desmond Miller* for Tate & Lyle Ld.

The arguments were substantially the same as those referred to before Harman J., and, in addition to the cases mentioned in the judgments, the following cases were cited: *Shaw* v. *Lichfield Conduit Lands Trustees*[1]; *Fanton* v. *Denville*[2]; *Mitchell* v. *Child*[3]; *G. Scammell & Nephew Ld.* v. *Rowles*[4]; *Watson* v. *Royal Insurance Co.*[5]; *Collins* v. *Joseph Adamson & Co.*[6]; *Van Den Berghs Ld.* v. *Clark.*[7]

Cur. adv. vult.

May 6. SINGLETON L.J. referred to the facts and continued: The question which has to be determined cannot be treated as merely a question of fact for the determination of the commissioners. In *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*,[1] Lord Reid said: "But it is in my "judgment a question of law whether particular payments are of "a nature capable of coming within the exception, and that is "the issue here."

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[1] (1920) 7 T.C. 597.

[2] [1932] 2 K.B. 309; 48 T.L.R. 433.

[3] (1942) 24 T.C. 511; [1942] 2 All E.R. 504.

[4] (1939) 22 T.C. 479; [1938] 3 All E.R. 577.

[5] [1896] 1 Q.B. 41; 12 T.L.R. 52.

[6] [1938] 1 K.B. 477; 54 T.L.R. 64; 21 T.C. 400; [1937] 4 All E.R. 236.

[7] (1935) 19 T.C. 390; 51 T.L.R. 393.

Section 1 of the Income Tax Act, 1918, provides that the tax shall be charged ". . . in respect of all property, profits, or gains "respectively described or comprised in the schedules . . . and "in accordance with the rules respectively applicable to those "schedules."

This case falls under Sch. D and the rules to be considered are the rules applicable to Case I: "The tax shall extend to "every trade carried on in the United Kingdom or elsewhere "and shall be computed on the full amount of the balance of "the profits or gains, . . ." and rules 1 (1) and 3 (*a*) of the rules applicable to Cases I and II. Rule 1 (1) is: "The tax shall be "charged without any other deduction than is by this Act "allowed," and rule 3 reads: "In computing the amount of "the profits or gains to be charged, no sum shall be deducted "in respect of (*a*) any disbursements or expenses, not being "money wholly and exclusively laid out or expended for the "purposes of the trade. . . ." It is on the application of rule 3 (*a*) to the facts of this case that the determination of the appeal depends. I paraphrase it: "No sum shall be deducted unless "it is a disbursement wholly and exclusively expended for the "purposes of the trade." Can it be said that the sum of £15,339 15s. 2d. expressed as expenditure on "Anti-nationaliza-"tion (specific)" was money wholly and exclusively laid out or expended for the purposes of the trade?

Before stating their conclusion, the commissioners set out their findings of fact, and they said that they accepted the evidence of the three witnesses who were called before them. [His Lordship referred to the evidence set out above, and continued:] No one questions the right of the company to oppose nationalization of the sugar refining industry: the question for consideration is whether the cost of so doing is money wholly and exclusively expended for the purposes of the trade. Lord Davey, in *Strong & Co. of Romsey Ld.* v. *Woodifield*,[2] said that the words "'for the purposes of the trade' . . . appear to me to

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[1] [1952] 1 T.L.R. 560, 565; [1952] 1 All E.R. 531, 535.

[2] [1906] A.C. 448, 453; 22 T.L.R. 754, 756.

Singleton L.J.

"mean for the purpose of enabling a person to carry on and earn "profits in the trade, etc. I think the disbursements permitted "are such as are made for that purpose. It is not enough that "the disbursement is made in the course of, or arises out of, or is "connected with, the trade, or is made out of the profits of the "trade. It must be made for the purpose of earning the profits." Speaking of this passage, Lord Radcliffe said in *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co.*[3]: "There is much "to be said for the criticism that Lord Davey's speech in *Strong "& Co.* v. *Woodifield*[4] imposes too limiting a criterion as to what "is a permissible deduction by way of trade expenditure, but I do "not know a wider one that is not vulnerable in other ways, and "the fact is that his criterion has stood for so long and been so "often applied that it has become, as it were, part of our income "tax language."

Expense incurred in maintaining the properties or assets of the company in a state to earn profits for the business, and expense incurred in protecting the assets against thieves or marauders are properly deductible in arriving at the balance of profits or gains, and so, too, may be the cost of insurance of the premises owned. A different element creeps in when the expense is incurred for the purpose of opposing nationalization of an industry or of a particular undertaking. Nothing in the nature of destruction of the assets of the undertaking is involved, nor is there a proposal to render the undertaking, or the industry, less profit-bearing, whatever the result might be. It is natural to assume that if the Government took control of an undertaking it would be their desire to increase rather than to diminish its efficiency and profit-earning capabilities. The proposal was that the ownership of the undertaking, and of the industry, should be taken over by the State, and that thereafter it should be managed by or on behalf of the State. (For the purposes of this appeal I do not draw any distinction between the two forms which nationalization has taken and which were referred to in the case.) The directors and the stockholders were anxious to prevent nationalization of the industry. They wished to retain control of their business, and no doubt they thought that they would be better placed if they did so.

Mr. Millard Tucker placed reliance on the speeches of Lord Loreburn and Lord Sumner in *Usher's Wiltshire Brewery Ld.* v.

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[3] [1952] 1 T.L.R. 560, 573; [1952] 1 All E.R. 531, 542.

[4] [1906] A.C. 448.

Bruce.[5] I do not think that much help is to be gained from them in the solution of this question. Nor do I find help in the words of Lord Atkinson [6] when he was dealing with insurance premiums: "They are found to be usual and proper trade out-"goings, and are made as such by the appellants." Those words were based on a finding of fact in the supplemental case. It cannot be said that the amount of £15,339 15s. 2d. was expenditure on usual and proper trade outgoings. The nearest approach to that—and it is a long way short of it—is the evidence of Mr. Nicholson, the auditor [as set out above]. I take that as meaning that the expenditure was not a capital expense and thus it must be treated as a revenue expense.

The suggested allocation shows that the sum of £15,339 15s. 2d. is attributed by the company to expenditure on "anti-nationalization (specific)." It seems to me that the money was expended (a) for the purpose of opposing nationalization of the industry, and of the company's undertaking; (b) for the purpose of preventing the company's assets being acquired by the State; (c) for the purpose of securing that the stockholders should be able to retain their interest in the undertaking; (d) for the purpose of maintaining the industry of sugar refining in private control and management as opposed to management by the State. I readily assume that the directors—and the stockholders—believed that it was desirable in the interests of consumers and of workpeople alike that the industry should not be nationalized.

I hope that I have not formed too wide a view as to the purposes of the expenditure: it is gleaned from the documents forming part of the case and from the evidence accepted by the commissioners. If all these purposes fall within the words "wholly and exclusively laid out or expended for the purposes "of the trade" this appeal must fail, for it matters not that there may be advantage in some other direction if the money was wholly and exclusively expended for the purposes of the trade. The contention put forward on behalf of the company is that the expenditure was incurred solely for the purposes of the trade of the company, that it was properly debited as an expense, and, in so far as it was made to protect the assets, it was a proper deduction against the profits of the year, in that it was expenditure to protect the assets of the profit-bearing undertaking.

[5] [1915] A.C. 433; 31 T.L.R. 104; 6 T.C. 399.

[6] [1915] A.C. 433, 452.

The Solicitor-General, on behalf of the Crown, submitted that the expenditure could not be said to be money wholly and exclusively laid out for the purposes of the company's trade, but that it was money expended for an extraneous purpose, namely, the purpose of conducting a campaign against nationalization of the sugar refining industry as a whole and of the company's business and assets in particular. And, further, that it was incurred in a campaign to ensure as far as possible that the earning of profits should remain in the hands of the company, and should not go into the hands of the State. The expenditure, he claimed, was in no sense directed to bringing grist to their mill—to use an expression of Rowlatt J. in *Union Cold Storage Co.* v. *Jones.*[7] And he added that expenditure to keep the ownership of the stock in the hands of the stockholders could not be regarded as a proper deduction under the rules.

The question is not an easy one to answer. If the government of the day proposed an extension of nationalization which would affect certain industries, and an individual or a trading concern engaged in one of those industries incurred expense, by subscription or otherwise, in opposing the proposal, can it be said that the expenditure is wholly and exclusively laid out for the purposes of the trade? If it is, the government bears almost half the cost at the present rate of tax, whatever the result. And it is not a far cry to the case of a subscription to the funds of the party in opposition.

There is no authority on the Income Tax Act, 1918, which provides any real help. There was cited to us the decision of the Privy Council in *Ward & Co. Ld.* v. *New Zealand Commissioner of Taxes.*[8] That case arose under section 86 (1) of the (New Zealand) Land and Income Tax Act, 1916, under which " No deduction " shall be made in respect of . . . (a) expenditure or loss of any kind " not exclusively incurred in the production of the assessable " income derived from that source. . . ." In view of the difference between that section and the rule with which we are concerned no guidance is given towards the solution of the question with which this court is faced, but it may be worth while repeating some words of Lord Cave L.C., which were to the same effect as those used in the New Zealand Court of Appeal[9]: " The " expenditure in question was not necessary for the production " of profit, nor was it in fact incurred for that purpose. It was " a voluntary expense incurred with a view to influencing public

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[7] 8 T.C. 725, 736.

[8] [1923] A.C. 145; 39 T.L.R. 90.

[9] [1923] A.C. 145, 149.

"opinion against taking a step which would have depreciated "and partly destroyed the profit-bearing thing. The expense "may have been wisely undertaken, and may properly find a "place, either in the balance sheet or in the profit and loss "account of the appellants." The expenditure in that case was incurred in a campaign in opposition to a measure of prohibition. The fact that it was disallowed has, as I have said, no bearing on the point at issue in this appeal, but the words of the Lord Chancellor are not without interest.

Perhaps the passage most helpful to the contention put forward on behalf of the company is in the speech of Lord Cave L.C. in *British Insulated and Helsby Cables Ld.* v. *Atherton*[10]: "It was made clear in . . . *Usher's Wiltshire Brewery Ld.* v. "*Bruce*[11] and *Smith* v. *Incorporated Council of Law Reporting* "*for England and Wales*[12] that a sum of money expended, not "of necessity and with a view to a direct and immediate benefit "to the trade, but voluntarily and on the grounds of commercial "expediency, and in order indirectly to facilitate the carrying on "of the business, may yet be expended wholly and exclusively "for the purposes of the trade; and it appears to me that the "findings of the commissioners in the present case bring the "payment in question within that description."

In each case the important question is to determine the purposes of the expenditure. Whichever way one looks, the words "wholly and exclusively" are facing one; they are the governing words of the rule. If there are purposes such as the desire to defeat nationalization of the industry, or to keep the stockholders in control of the undertaking, can it be said that the money was expended wholly and exclusively for the purposes of the trade? Such purposes as I have indicated take the case quite out of the ordinary run, and no authority provides much help.

It is necessary to go back to the words of rule 3 (*a*) of the rules applicable to Cases I and II. If I am right in my conception of the purposes of the expenditure of the sum of £15,339 15s. 2d., I cannot bring myself to think that the expenditure was wholly and exclusively for the purposes of the trade. Even if it be conceded that one of the reasons for the expenditure was for the purposes of the trade, it cannot, I think, be said that this was the only purpose. There were other purposes outside the earning of profits and outside the purposes of the trade. Clearly, one of those purposes was to keep the earnings in the hands of the company, or of its stockholders, and to avoid Government acquisition of them and of the assets of the company. Under nationalization, the trade and earnings, or profits, of the undertaking might have been the same or more, the same management might have remained and the same workpeople might have been employed, but the profits would not have gone to the same people. The desire to retain those in the hands of the stockholders and to retain control of the undertaking in the hands of individuals, rather than to allow the State to take both, were to my mind among the purposes for which the expenditure was incurred.

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[10] [1926] A.C. 205, 211; 42 T.L.R. 187, 188; 10 T.C. 155, 191.

[11] [1915] A.C. 433.

[12] [1914] 3 K.B. 674; 30 T.L.R. 588; 6 T.C. 477.

I am in favour of allowing the appeal.

JENKINS L.J. referred to the facts and continued: Such being the facts, the question in the appeal is whether on these facts the commissioners and the judge were right in law in holding, as they did, that the respondent company's expenditure on its anti-nationalization campaign was "money wholly and exclusively laid out or expended for the purposes of the" respondent company's "trade" within the meaning of rule 3 (*a*) of the rules applicable to Cases I and II of Schedule D to the Income Tax Act, 1918. In answering this question it must be borne in mind that the commissioners are the judges of fact, and accordingly that their decision should not be disturbed if, on the facts as found by them, the disputed expenditure is capable in law of being held to satisfy the above-stated requirement of rule 3.

The relevant statutory provisions are these. The Income Tax Act, 1918, s. 209 (1) (*a*), which provides "In arriving at the "amount of profits or gains for the purpose of income tax— "(*a*) no other deductions shall be made than such as are expressly "enumerated in this Act." Schedule D, para. 1 (*a*) (ii), is: "Tax under this schedule shall be charged in respect of—(*a*) The "annual profits or gains arising or accruing— . . . (ii) to any "person residing in the United Kingdom from any trade, pro"fession, employment, or vocation, whether the same be "respectively carried on in the United Kingdom or elsewhere." Para. 2: "Tax under this schedule shall be charged under the "following cases respectively; that is to say,—Case I.—Tax in "respect of any trade not contained in any other schedule." The rule applicable to Case I of Schedule D is: "The tax shall "extend to every trade carried on in the United Kingdom or "elsewhere, . . . and shall be computed on the full amount of "the balance of the profits or gains."

The rules applicable to Cases I and II, so far as relevant, are as follows. Rule 1 (1): "The tax shall be charged without any "other deduction than is by this Act allowed." Rule 3 (*a*): "In "computing the amount of the profits or gains to be charged, "no sum shall be deducted in respect of—(*a*) any disbursements "or expenses, not being money wholly and exclusively laid out "or expended for the purposes of the trade"; to which one might add sub-para. (*f*) of the same rule: "In computing the amount "of the profits or gains to be charged, no sum shall be deducted "in respect of—(*f*) any capital withdrawn from, or any sum "employed or intended to be employed as capital in such trade, "profession, employment or vocation."

The curiously negative structure of these provisions, or their predecessors, has been the subject of much comment. Section 209 (1) (*a*) enjoins that in arriving at the amount of profits or gains for the purpose of income tax no other deductions shall be made than such as are expressly enumerated in the Act. But turning to the rules applicable to Cases I and II of Schedule D, one finds in rule 3, instead of an enumeration of permitted deductions, an enumeration of items the deduction of which is prohibited, with certain exceptions from or qualifications of those prohibitions. Thus, rule 3 (*a*) does not provide that money wholly and exclusively laid out or expended for the purposes of the trade may be deducted, but that no sum shall be deducted in respect of any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade. It is, however, obvious that if no deduction at all of expenses from gross receipts was allowed, it would be impossible to arrive at the balance of the profits and gains of a trade upon which tax under Case I of Schedule D is to be assessed. Accordingly, it has long been well settled that the effect of these provisions as to deductions is that the balance of the profits and gains of a trade must be ascertained in accordance with the ordinary principles of commercial trading, by deducting from the gross receipts all expenditure properly deductible from them on those principles, save in so far as any amount so deducted falls within any of the statutory prohibitions contained in the relevant rules, in which case it must be added back for the purpose of arriving at the balance of profits and gains assessable to tax.

See *Usher's Wiltshire Brewery Ld.* v. *Bruce*[13] *per* Lord Loreburn,[14] Lord Parker of Waddington,[15] Lord Sumner[16] and Lord Parmoor.[17]

It appears to have been argued for the inspector before Harman J. (though it had not been so contended before the commissioners) that even if the expenditure on the respondent company's anti-nationalization campaign was laid out wholly and exclusively for the purposes of the respondent company's trade, it was not proper to be deducted in ascertaining the respondent company's profits according to the ordinary principles of commercial trading, because it was of a capital nature; and, accordingly, that irrespective of any statutory prohibition, it was not a permissible deduction for income tax purposes. This submission was (as I think, rightly) rejected by the judge, and direct reliance on it as a substantive ground of appeal was (if I understood him correctly) disclaimed by the Solicitor-General in the course of the argument before us. It was, however, suggested in this court, though perhaps somewhat faintly, that, on grounds which I confess I had difficulty in following, the expenditure in question, though not strictly speaking of a capital nature, was nevertheless not properly deductible in ascertaining the company's profits on the ordinary principles of commercial trading. This argument was never fully or clearly developed, and was, I think, in the end virtually abandoned; but if and so far as it should be considered as remaining on foot, I reject it. There is no trace of it in the inspector's contentions as set out in the case stated, and I think that it is really concluded against him by the evidence of Mr. Nicholson as summarized and accepted by the commissioners.

One other point can be shortly disposed of. It was contended on behalf of the inspector before the commissioners and before Harman J. that the expenditure on the anti-nationalization campaign, even if laid out for the purposes of the respondent company's trade, was not wholly and exclusively so laid out, inasmuch as it was concerned with the sugar refining industry as a whole and not confined to the respondent company's undertaking. With regard to this submission Harman J. said[18]: "There is in my judgment nothing in this point. It was clear

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[13] (1914) 6 T.C. 399; [1915] A.C. 433.

[14] 6 T.C. 418; [1915] A.C. 443.

[15] 6 T.C. 429; [1915] A.C. 457.

[16] 6 T.C. 434; [1915] A.C. 465.

[17] 6 T.C. 439; [1915] A.C. 471.

[18] Ante.

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" that a campaign of this sort could not be conducted in favour " of one concern in the industry and that the only way to protect " the respondents was to protect their competitors along with " them. Therefore the fact that the whole industry was included " did not make the money the less laid out exclusively for the " purposes of the respondents' trade." I need do no more than say that I entirely agree with the judge on this point, for it was abandoned by the Solicitor-General in the course of the argument before us.

There remains, as the one live issue in the case, the question I have already posed, namely, whether on the facts as found by the commissioners the disputed expenditure was in law rightly held by them and by Harman J. to have been wholly and exclusively laid out or expended for the purposes of the respondent company's trade within the meaning of rule 3 (*a*) of the rules applicable to Cases I and II of Schedule D; or perhaps I should say, whether, on the facts as found, it was capable in law of being held to have been so laid out or expended.

The deceptively simple words " wholly and exclusively . . . " for the purposes of the trade," which at first sight suggest a plain question of fact well within the competence of experienced commissioners, have been the subject of much judicial discussion; and at this time of day it is out of the question for anyone to maintain that they do not involve a question of law. In *Strong & Co. of Romsey Ld.* v. *Woodifield* [19] Lord Davey placed on the corresponding provision of the Income Tax Act, 1842, the following construction, which has held the field ever since: " These " words are used in other rules, and appear to me to mean for the " purpose of enabling a person to carry on and earn profits in " the trade, etc. I think the disbursements permitted are such " as are made for that purpose. It is not enough that the dis- " bursement is made in the course of, or arises out of, or is " connected with, the trade, or is made out of the profits of the " trade. It must be made for the purpose of earning the profits." The actual sum there held not to have been laid out or expended for the purposes of the trade was a sum of damages payable by the appellants to a customer sleeping at one of their inns who was injured by the fall of a chimney.

In *Usher's Wiltshire Brewery Ld.* v. *Bruce* [20] the disputed deductions were in respect of the following expenses in connexion with the tied houses of a brewery company: (A) repairs to tied houses; (B) differences between rents of leasehold houses or Schedule A assessment of freehold houses and the rents received from tied tenants; (C) fire and licence insurance premiums; (D) rates and taxes, and (F) legal and other costs. All those expenses were held in the House of Lords to be admissible deductions as being money wholly laid out or expended for the purposes of the trade of the brewery company. The following passages from the speeches in the House of Lords with respect to two of those items may usefully be quoted. With respect to item (A) (the repairs) Lord Atkinson said [21]: "Now the " supplemental statement of the facts in par. A sets forth that " though the tenants are under their agreements bound to make " the necessary repairs, the appellants, in fact, execute them at " their own expense, because it is found to be to their interest " commercially so to do rather than to enforce the obligations of " their tenants; that the cost of the repairs is incurred not as a " matter of charity, but of commercial expediency in order to " avoid the loss of tenants, and the consequent transfers, to " which the licensing justices object. The meaning of par. 8 " taken together with this par. A is, I think, simply this, that " in the proper and reasonable conduct by the appellants of their " trade they are obliged to defray the cost of these repairs, " inasmuch as the same are necessary to enable the houses to " serve the very purposes for which the appellants have solely " and exclusively acquired and used them."

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[19] [1906] A.C. 448, 453.

[20] [1915] A.C. 433.

" I may say for myself that I am wholly unable to follow the " line of reasoning which would lead one to the conclusion that " where premises have been acquired and used wholly and " exclusively for a particular purpose, the expenditure upon them " necessary to enable them to fulfil that purpose is not expenditure incurred solely and exclusively for the very purpose for " which they have been acquired and used. I think therefore " that the condensed meaning of these paragraphs when properly " construed is simply this, that the expenditure for repairs is " incurred solely and exclusively for the purposes of the " appellants' trade."

With respect to the same item Lord Parker said [22]: " Though " each tenancy agreement contains a repairing covenant on the " part of the tenant, the tenant in fact does no repairs. The " brewery company have found by experience that as a matter

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[21] [1915] A.C. 433, 450; 6 T.C. 399, 424.

[22] [1915] A.C. 433, 461; 6 T.C. 399, 431.

" of commercial expediency it is better to do the repairs them-" selves rather than, by insisting on performance of the " covenants, to run the risk of loss of tenants and consequent " transfers to which the licensing justices object. The appellants " claim that the amount so spent in repairs ought to be deducted " in ascertaining the balance of profits and gains of their trade, " such repairs having, as found in the case, been solely repairs " which the appellants were bound to do in order to maintain " the licensed houses in a condition fit to use as licensed houses, " and the sum expended not being an excessive sum to be " expended in such repairs. I am of opinion that the appellants " are right in this contention."

With respect to item (C) (the insurance premiums) Lord Atkinson said [23]: " As to item C, the purposes for which the " insurances upon the premises are effected are set out. They " are found to be usual and proper trade outgoings, and are made " as such by the appellants. They are designed to cover the loss " of the fabric by fire and the loss sustained if the licences were " not renewed. *Smith* v. *Lion Brewery Co.*[24] applies, I think, " to the latter disbursement, and the remarks I have already " made apply to the former as well as to the remaining items D " and F."

In *Smith* v. *Incorporated Council of Law Reporting*,[25] where a gratuity paid to a retiring law reporter was claimed as a deductible expense of the council's trade, Scrutton J., in holding the deduction of the sum in question admissible, expressed what I think must now be regarded as the untenable view that the question whether a sum was wholly and exclusively laid out or expended for the purposes of the trade was a question of fact; but in the course of his judgment he gave some useful illustrations of sums which might be held to answer that description [26]: " There may be cases where it is clear even to a judge who knows " nothing about the trade, that a particular payment could not be " wholly or exclusively laid out for the purposes of the trade. I " do not desire to discuss politics, but I take examples which " seem to me fairly clear. Payments for political purposes might " conceivably be for the purposes of trade. It might be that a " payment by a company to the Tariff Reform League might be " of great advantage to its trade. It might be that a payment " by a company to a political party which was supposed to be

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[23] [1915] A.C. 433, 452; 6 T.C. 424.
[24] [1911] A.C. 150.
[25] [1914] 3 K.B. 674.
[26] Ibid. 684.

"identified with the interests of a particular trade might be to the "advantage of the trade; but one can easily imagine cases, such "as a payment by a company to the National Service League, "where it would be impossible to conceive that anybody could "find that such money was wholly or exclusively laid out or "expended for the purposes of the trade."

In *Union Cold Storage Co. Ld.* v. *Jones*[27] a company which had made over premises situated abroad to an American company for a term of years continued after the transfer to pay fire insurance premiums in respect of the premises. Rowlatt J. and the Court of Appeal held that the premiums so paid were not deductible, Rowlatt J. observing[28]: "The appellant company have "parted with this business . . . and they have got the ownership "left in them of some premises abroad and they think fit or may "be compelled, it does not matter which, to insure them against "fire. That is not bringing grist to their mill or bringing "customers to their door."

In *British Insulated and Helsby Cables Ld.* v. *Atherton*[29] (where the actual decision was to the effect that a lump sum paid by a company to form the nucleus of a pension fund for its employees was in the nature of capital expenditure and, therefore, not deductible in arriving at the company's profits) Lord Cave said[30]: "My Lords, I think it clear that the deduction from the "profits of the above-mentioned sum of £31,784 is not prohibited by the first rule applicable to Cases I and II, which "prohibits the deduction of a disbursement not being money "wholly and exclusively laid out or expended for the purposes of "the trade. It was made clear in the above cited cases of "*Usher's Wiltshire Brewery Ld.* v. *Bruce*[31] and *Smith* v. *Incorporated Council of Law Reporting*[32] that a sum of money "expended, not of necessity and with a view to a direct and "immediate benefit to the trade, but voluntarily and on the "grounds of commercial expediency, and in order indirectly to "facilitate the carrying on of the business, may yet be expended "wholly and exclusively for the purposes of the trade; and it "appears to me that the findings of the commissioners in the "present case bring the payment in question within that description. They found (in words which I have already quoted) that "the payment was made for the sound commercial purpose of

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[27] 8 T.C. 725.
[28] Ibid. 736.
[29] [1926] A.C. 205; 42 T.L.R. 187.
[30] [1926] A.C. 205, 211.
[31] [1915] A.C. 433.
[32] [1914] 3 K.B. 674; 30 T.L.R. 588.

"enabling the company to retain the services of existing and "future members of their staff and of increasing the efficiency "of the staff; and after referring to the contention of the Crown "that the sum of £31,784 was not money wholly and exclusively "laid out for the purposes of the trade under the rule above "referred to, they found that the deduction was admissible—thus "in effect, although not in terms, negativing the Crown's "contention. I think that there was ample material to support "the findings of the commissioners, and accordingly that this "prohibition does not apply."

In *Mitchell* v. *B. W. Noble Ld.*,[33] a large payment made by a company to a retiring director in settlement of a dispute with him was held by Rowlatt J. and the Court of Appeal to be deductible. Lord Hanworth M.R. said [34]: "It was a payment made in the "course of business, with reference to a particular difficulty "which arose in the course of the year, and was made not in "order to secure an actual asset to the company but to enable "the company to continue to carry on, as it had done in the "past, the same type and high quality of business, unfettered "and unimperilled by the presence of one who, if the public "had known about his position, might have caused difficulty "in its business and whom it was necessary to deal and "settle with at once." Sargant L.J. said [35]: "Now, first, as "to the question whether this was a disbursement wholly and "exclusively laid out or expended for the purposes of the "trade, it seems to me that there is nothing at all to show "that it was not so exclusively laid out. The object, as dis-"closed by para. 9 of the Case, was that of preserving the status "and reputation of the company, which the directors felt would "be somewhat imperilled by the other director remaining in "the business or by a dismissal of him against his will, involving "proceedings by way of action in which the good name of the "company might suffer. To avoid that and to preserve the status "and dividend earning power of the company seems to me a "purpose which is well within the ordinary purposes of the trade, "profession or vocation of the company."

In *Southern* v. *Borax Consolidated Ld.*,[36] a company incurred legal expenses in defending proceedings in America in which its title to certain premises there were attacked, and Lawrence J., in holding these expenses deductible, said [37]: "It appears to me "that the legal expenses which were incurred by the respondent "company did not create any new asset at all, but were expenses "which were incurred in the ordinary course of maintaining the "assets of the company and the fact that it was maintaining "the title and not the value of the company's business does not, "in my opinion, make it any different." That case was approved in *Associated Portland Cement Manufacturers Ld.* v. *Kerr* [38] (*per* Lord Greene M.R.).

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[33] [1927] 1 K.B. 719; 43 T.L.R. 245.

[34] [1927] 1 K.B. 737.

[35] Ibid. 738.

[36] [1941] 1 K.B. 111; [1940] 4 All E.R. 412.

In *Cooke* v. *Quick Shoe Repair Service*,[39] a firm purchased a business on terms that the vendor should discharge all liabilities of the business outstanding at the date of sale. The vendor failed to do so and the firm accordingly discharged the liabilities itself in order to preserve the goodwill and to ensure continuity of supplies, and the sums so expended were held by Croom-Johnson J. to be deductible on the principles stated in *Smith* v. *Incorporated Council of Law Reporting*,[40] *British Insulated and Helsby Cables Ld.* v. *Atherton*,[41] *Southern* v. *Borax Consolidated Ld.*[42] and *Mitchell* v. *B. W. Noble Ld.*[43]

Lastly, so far as English authorities are concerned, I should refer to the two recent cases in the House of Lords of *Smith's Potato Estates Ld.* v. *Bolland*,[44] and *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*[45] In *Smith's Potato Estates Ld.* v. *Bolland* [46] the House held by a majority that the costs of contesting an excess profits tax assessment were not deductible. Lord Porter said of the phrase "purposes of the "trade" [47]: "The phraseology and its meaning have been dealt "with in a considerable number of cases, but before considering "their effect I think it desirable to state the conclusion at which "I should have arrived from a study of the wording of the section "itself. The widest meaning attributed to it, and that for which "the appellants contend, is perhaps best expressed by saying that "it includes every expense to which the trader is put because he "carries on the trade. . . . The opposite view, maintained by the "Crown, is perhaps best expressed in the case of *Strong & Co. of* "*Romsey Ld.* v. *Woodifield*, where Lord Davey says [48]: 'These "'words . . . appear to me to mean for the purpose of enabling

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[37] [1941] 1 K.B. 120.

[38] 62 T.L.R. 115, 117; [1946] 1 All E.R. 68, 72; 27 T.C. 103, 118.

[39] 30 T.C. 460.

[40] [1914] 3 K.B. 674.

[41] [1926] A.C. 205.

[42] [1941] 1 K.B. 111.

[43] [1927] 1 K.B. 719.

[44] [1948] A.C. 508; 64 T.L.R. 430; [1948] 2 All E.R. 367.

[45] [1952] 1 T.L.R. 560.

[46] [1948] A.C. 508.

[47] Ibid. 519.

[48] [1906] A.C. 448, 453.

" 'a person to carry on and earn profits in the trade.' My Lords, " that expression has often been referred to and approved, but " it was used in reference to the circumstances of the case then " under consideration and I doubt if it carries the matter to a " final conclusion. It still leaves open the question what expense " is incurred for the purpose of enabling a trader to earn profits " and the adoption of a phrase helpful in analysing the meaning " of words in an Act of Parliament with reference to a particular " set of circumstances is not necessarily either useful or conclu- " sive in all cases. It is probably safer to retain the wording of " the Act itself and, by applying it to the facts established, to " discover whether the deduction falls within its terms or not."

Lord Porter[49] commented thus on *Strong & Co. of Romsey Ld.* v. *Woodifield*[50]: " My Lords, the case of *Strong & Co. of* " *Romsey Ld.* v. *Woodifield*[50] may be said to form the starting " point for deducing the principles at stake in the present appeal " and, though the words of Lord Davey quoted above are the " expression most frequently referred to, I think that those of " Lord Loreburn L.C. have equal, if not greater, importance. He " says[51]: 'It does not follow that if a loss is in any sense con- " 'nected with the trade, it must always be allowed as a deduc- " 'tion; for it may be only remotely connected with the trade, or " 'it may be connected with something else quite as much as or " 'even more than with the trade. I think only such losses can " 'be deducted as are connected with, in the sense that they are " 'really incidental to, the trade itself. They cannot be deducted " 'if they are mainly incidental to some other vocation or fall " 'on the trader in some character other than that of trader.' " Further, Lord Davey, after pointing out that Case I relates " to trades, manufactures, adventures or concerns in the nature of " trade, goes on to say[52]: 'It is not enough that the disburse- " 'ment is made in the course of, or arises out of, or is connected " 'with, the trade, or is made out of the profits of the trade. It " 'must be made for the purpose of earning the profits.' These " expressions of opinion given some 40 years ago and accepted " ever since are, in my view, inconsistent with the appellants' " contention, but it is said they are at best dicta and are inconsis- " tent with the principles upon which such authorities as *Smith* " v. *Lion Brewery Co. Ld.*[53] and *Usher's Wiltshire Brewery Ld.*

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[49] [1948] A.C. 508, 521.
[50] [1906] A.C. 448.
[51] Ibid. 452.
[52] Ibid. 453.
[53] [1911] A.C. 150.

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"v. *Bruce*[54] are based, and in particular with the observations "of Viscount Cave L.C. in *British Insulated and Helsby Cables* "*Ld.* v. *Atherton.*"[55]

Of the passage in the last-mentioned case, to which I have already referred, Lord Porter said[56]: "My Lords, this statement was obiter only, as the actual decision was merely that "the expenditure was capital expenditure and therefore not "deductible, but the language does require careful consideration. "In that case the question actually in issue was whether subscriptions by a company towards a pension fund were to be "deducted in ascertaining the balance of profits and gains of its "trade, and it is true that the expenditure did not at once affect "its revenue, but it was a method of ensuring the better and "more contented service of its employees and in that sense it "did directly affect the success of its enterprise. It was "exclusively laid out to enable the company to be more successful; no part of it was incurred in order to ascertain the "Revenue's proportion of the profits when made." Lord Simonds said[57]: "My Lords, I suppose that few expressions "have been discussed more often in the court than that which "you have once again to consider, 'money wholly and exclusively laid out or expended for the purposes of the trade.' "But it is their application rather than their meaning that is in "doubt. I agree with the submission of learned counsel that it "does not help to substitute other words for those which are found "in the statute and then to put a gloss upon those other words. "But it is, I think, important to emphasize that the words 'for "'the purposes of the trade' in their context, i.e., where a "computation of 'profits' for the ascertainment of taxable "income is being made, must mean 'for the purpose of enabling "'a person to carry on and earn profits in the trade.' These "familiar words I cite from Lord Davey's speech in *Strong &* "*Co. of Romsey Ld.* v. *Woodifield.*[58] They have been cited and "applied over and over again, and, if they are kept firmly in "mind, they dispose in limine of the argument which prevailed "with Atkinson J. and has been urged before your Lordships."

In *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*[59] the House held that Irish taxes were not deductible. Lord Reid referred to Lord Davey's speech in *Strong & Co. of*

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[54] [1915] A.C. 433.
[55] [1926] A.C. 205, 211.
[56] [1948] A.C. 508, 522.
[57] Ibid. 526.
[58] [1906] A.C. 448, 453.
[59] [1952] 1 T.L.R. 560.

Romsey Ld. v. *Woodifield*,[60] and said [61]: "This explanation has "always been regarded as authoritative and is difficult to "reconcile with the respondents' contention." Lord Radcliffe, after quoting again Lord Davey's speech in the last-mentioned "case, said [62]: "In this case there is no material that makes it "possible to say that these taxes (let alone any particular pro- "portion of them) were paid for the purpose of earning such "profits as were earned in the United Kingdom. There is much "to be said for the criticism that Lord Davey's speech in *Strong* "*& Co. of Romsey Ld.* v. *Woodifield* [63] imposes too limiting a "criterion as to what is a permissible deduction by way of trade "expenditure: but I do not know a wider one that is not "vulnerable in other ways, and the fact is that his criterion has "stood for so long and been so often applied that it has become, "as it were, part of our income tax language."

The foregoing review of authorities, though I fear unduly long, is by no means exhaustive. Many other cases might be referred to, but no useful purpose would be served by further multiplying citations. Each case depends to a great extent on its particular facts and is of assistance only in so far as some general principle emerges from it, and I think that the cases which I have selected for reference can be regarded as sufficiently expounding and illustrating the law to be applied to the particular facts of the case now before the court.

The principles which emerge seem to be these: (1) The prohibition against the deduction of disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade means that, in order to be deductible, a disbursement or expense must be laid out or expended wholly and exclusively for the purpose of enabling the trader concerned to carry on and earn profits in the trade (Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield* [64]). But (2) notwithstanding Lord Davey's additional observation to the effect that the disbursement must be made "for the purpose of earning the "profits," Lord Loreburn's observation in the same case [65] to the effect that disbursements to be deductible must be "really "incidental to, the trade itself," and Rowlatt J.'s reference in *Union Cold Storage Co. Ld.* v. *Jones* [66] to "bringing grist to the "mill," it is clear that disbursements to be deductible need not be directly or immediately productive of profit. "A sum of "money expended . . . voluntarily and on the grounds of com- "mercial expediency, and in order indirectly to facilitate the "carrying on of the business, may yet be expended wholly and "exclusively for the purposes of the trade" (*per* Lord Cave L.C. in *Atherton's* case [67]). (3) Payments made for the purpose of preserving the assets or goodwill of a business, and thereby safeguarding its earning capacity, and payments for protecting the trader from losses in his trade or from being deprived of the means of carrying it on, may be wholly and exclusively laid out for the purposes of the trade, just as much as payments made for the immediate purpose of producing or increasing profits. (Compare the fire insurance premiums in *Usher's Wiltshire Brewery Ld.* v. *Bruce*,[68] the payment to the retiring director in *Mitchell* v. *B. W. Noble Ld.*,[69] the legal expenses in *Southern* v. *Borax Consolidated Ld.*,[70] and the discharge of the liabilities of the predecessor in business in *Cooke* v. *Quick Shoe Repair Service.*[71]) But (4) payments made out of profits when earned (such as the Irish tax in *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*[72]), or in relation to the determination of a liability to tax on those profits (as in *Smith's Potato Estates Ld.* v. *Bolland* [73]), or (by parity of reasoning) payments made with a view to preventing the transfer from one person or class of persons to another of the right to receive, through the trader, the profits when earned, are not made for the purposes of the trade within the meaning of the statutory prohibition.

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[60] [1906] A.C. 448.
[61] [1952] 1 T.L.R. 560, 569.
[62] Ibid. 573.
[63] [1906] A.C. 448.
[64] Ibid. 453.
[65] Ibid. 452.
[66] 8 T.C. 725, 736.

The effect of the facts found by the commissioners in the present case, and in particular on the evidence of Lord Lyle and Mr. Booth, which they accepted, was that the directors believed that there was a real risk of the "nationalization" of the sugar refining industry in general and of the company's undertaking in particular, and (with the qualification mentioned below) further believed that if this occurred the State would take over the company's assets and business, thus bringing completely to an end the whole of the trading activities of the company in its business of sugar refining. The qualification to which I have just referred is that whereas, according to the evidence as summarized in the case, Lord Lyle had "never thought of the "alternative method of nationalization by which the State would

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[67] [1926] A.C. 205, 212.
[68] [1915] A.C. 433.
[69] [1927] 1 K.B. 719.
[70] [1941] 1 K.B. 111.
[71] 30 T.C. 460.
[72] [1952] 1 T.L.R. 560.
[73] [1948] A.C. 508.

"have acquired all the capital stock of the company from its "members," Mr. Booth said "It did occur to me that one way "of nationalizing the company would be for the State to acquire "all the capital stock, but they had no right to assume which "form nationalization would take. There was a danger that it "would take various forms, but they could only assume the "worst and do their best to protect their own business. They "were anxious to prevent nationalization from taking place in "any form." It should, therefore, be taken that the directors' belief that, in the event of nationalization, the State would take over the company's assets and business, was tempered by recognition on the part of at least one of them of the possibility that nationalization might take the less direct form of a compulsory acquisition by or on behalf of the State of all the issued capital stock of the company.

The evidence of these two directors having been accepted by the commissioners, it must be taken for the purposes of this appeal that the board of the company genuinely believed that there was a serious risk of the introduction and passing of legislation for the nationalization of the sugar refining industry in general and the company's undertaking in particular, and further genuinely believed that there was a serious risk that any such legislation would involve the taking over by or on behalf of the State of the company's assets and business; and it must also be taken that the real and genuine object of the anti-nationalization campaign was (as Lord Lyle in effect put it) primarily to prevent the company from losing its business and to preserve its assets intact, though incidentally the preservation of the company's business would save the stockholders from injury as well, or (in other words) to preserve the assets and business of the company, and by so doing protect the interests of the company's stockholders.

The suggestion that the expenditure on the anti-nationalization campaign was not properly deductible from profits according to the ordinary principles of commercial trading being out of the way, I cannot for my part find any sufficient ground for the view that on the facts found and evidence accepted by the commissioners this expenditure was incapable in law of being held to have been wholly and exclusively laid out or expended "for the "purposes of" the company's "trade" within the meaning of that expression as construed and explained by the authorities. Two grounds for that view were advanced on behalf of the inspector. First, it was said that nationalization, even in the full and direct form of a compulsory acquisition of the whole of the assets and undertaking of the company, would not destroy the company's business but merely transfer it from the ownership of the company into the ownership of whatever body or authority the nationalizing legislation might constitute for the purpose of carrying it on. Thus, it was argued that the expenditure in question was not laid out for the purpose of preserving the company's business, but for the purpose of preventing the company's business from being taken away from the company and transferred to, and thenceforth carried on by, the new body or authority.

I confess myself unable to follow this argument. The trade with which we are here concerned is surely the trade carried on by the company; the purposes for which the disputed expenditure, in order to be allowable as a deduction, must be shown to have been laid out are surely the purposes of the trade so carried on; and when Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield* [74] explained expenditure for the purposes of the trade as expenditure for the purpose of enabling a person to carry on and earn profits in the trade, surely he meant for the purpose of enabling the trader claiming to deduct that expenditure to carry on and earn profits in *his* trade. It is clear on the authorities that Lord Davey's formula includes expenditure for the purpose of preventing a person from being disabled from carrying on and earning profits in the trade. Here, too, it seems to me reasonably plain that the relevant trade is that of the trader claiming to make the deduction. There is no doubt that legislation compulsorily divesting a trader of the whole of the assets and goodwill of his business, and (one may suppose) precluding him from establishing any similar business in the future, would utterly disable him from carrying on and earning profits in his trade. In such a case the destination provided by the legislation for the goodwill and assets so divested would, as it seems to me, be wholly immaterial for the purposes of the present question. Such assets and goodwill might be merged with those of other businesses similarly taken over in the hands of some statutory body or authority. Alternatively, a separate business might be carried on by the acquiring body or authority in succession to the hypothetical trader I have mentioned, with and by means of the assets and goodwill compulsorily acquired from him. But, whichever course was taken, *his* trade and *his* ability to earn profits in that trade would be clean gone. One may add, so far as the present case is concerned, there is no reason for supposing that if nationalization had supervened the second of the above-mentioned courses would have been taken rather than the first.

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[74] [1906] A.C. 448.

The second argument presented for the inspector was to the effect that nationalization, if it had taken place at all, might have been carried out by means of compulsory acquisition by or on behalf of the State of the whole of the capital stock of the company, in which case the assets and business of the company would have been preserved intact in the hands of the company; that as nationalization might possibly have taken this form, the company's anti-nationalization campaign must be taken to have been partly directed against this possible form of nationalization; and that so far as the campaign was so directed, it was concerned, not with enabling the company to continue to carry on and earn profits in its trade, but with the destination of its profits when earned; and accordingly that, on the principle of *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*[75] and *Smith's Potato Estates Ld.* v. *Bolland*,[76] the expenditure incurred in the campaign was to this extent not laid out for the purposes of the company's trade, and, therefore, not wholly and exclusively so laid out. I cannot accept this argument. At the time of the anti-nationalization campaign all that could be said with certainty was that there was a risk of nationalization. What form nationalization might take, if it took place at all, no one could say. The directors of the company believed that if it did take place there was a serious risk (to put it no higher) that the company's assets and business would be taken over by the State. They accordingly launched their anti-nationalization campaign for the purpose of protecting the company's assets and business against that risk.

It might, of course, be that in the actual event nationalization would not take place at all, for reasons wholly unconnected with the campaign. But that would not have affected the quality of the expenditure on the campaign, though in the result it might be said to have served no useful purpose. Again, nationalization might take place in the form of a compulsory acquisition of the business and assets of the company. In that case the campaign would have failed, and in the result the money spent on the campaign would have been thrown away. But

[75] [1952] 1 T.L.R. 560.

[76] [1948] A.C. 508.

that would not have affected the quality of the expenditure, any more than the quality of a trader's expenditure on fire insurance is affected by the circumstance that his buildings never in fact catch fire. Finally, nationalization might take place in some less direct form, such as the compulsory acquisition by or on behalf of the State of the whole of the capital stock of the company. In that case, the risk against which the campaign was designed to protect the company (that is, the loss of its assets and business) would not have materialized, though for practical purposes a substantially similar result would indirectly have been achieved. But again, I fail to see how that could affect the quality of the expenditure. Given a decision by the directors that they ought, as a matter of commercial expediency, to do what they could by means of publicity and propaganda to save the company from being deprived of its assets and business through nationalization (and I think it is clear that this on the facts found must be imputed to them) I fail to see how they could implement that decision otherwise than by campaigning against nationalization, or how it can be said that their purpose was not to protect the business and assets of the company because nationalization might possibly take the indirect form of a compulsory acquisition of capital stock, as distinct from the direct form of a compulsory acquisition of the assets and undertaking of the company.

I have only to add, with respect to the Privy Council case of *Ward & Co. Ld.* v. *New Zealand Commissioner of Taxes*,[77] that while the expenditure in question affords a closer parallel to the disputed expenditure in the present case than is to be found in any of the other cases of which I am aware, the language of the material New Zealand enactment which prohibited the deduction of expenditure [78] " not exclusively incurred " in the production of the assessable income " was so markedly different from, and so much narrower than, the language of the enactment governing the present case that I cannot regard it as providing any authority against the conclusion to which I have come. As Lord Cave said at the end of his judgment [79]: " It is " only necessary to add that the decisions on the English Income " Tax Acts, the language of which is different from that of the " New Zealand Act, have no real bearing upon the question now " under decision."

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[77] [1923] A.C. 145.

[78] Ibid. 147.

[79] Ibid. 150.

For the reasons which I have stated, I would dismiss this appeal.

Hodson L.J. (read by Jenkins L.J.): The question in this appeal is whether expense incurred in a propaganda campaign against nationalization of the sugar refining industry organized by the respondent company is deductible for income tax purposes in computing the balance of profits and gains of the company. If this expense is deductible it must be because it was wholly and exclusively paid or expended for the purposes of the trade of the respondent company.

The Crown contends that none of this expenditure can be regarded as expenditure in carrying on the trade or as expenditure incurred for earning profits in the trade, but that, on the contrary, it was incurred to secure that the ownership of the assets of the company should remain in the same hands. It is said that the object being to secure that the present owners remain the owners, the object is not to secure profits, and just as expenditure incurred in acquiring a capital asset is not deductible, so expenditure incurred in the prevention of acquisition is equally not deductible.

The question has not arisen before in the courts of this country, but a similar case has arisen in the Privy Council on appeal from the Court of Appeal of New Zealand, namely, *Ward & Co. Ld.* v. *New Zealand Commissioner of Taxes.*[80] A poll of voters being about to be held under statutory authority on the question whether or not prohibition of intoxicants should be introduced, a brewery company carrying on business in New Zealand expended money in printing and distributing anti-prohibition literature. The company sought to deduct the expenditure in the assessment of the income derived from their business for the purposes of the Land and Income Tax Act, 1916, of New Zealand. By section 86, rule 1 (a), of that Act no "deduction shall be made in respect of . . . (*a*) Expenditure "or loss of any kind not exclusively incurred in production of "the assessable income." It was held that the company was not entitled to make the deduction having regard to the language of the subsection.

It is to be observed that the words "exclusively incurred in "the production of the assessable income" are different from, and narrower than, the words "wholly and exclusively laid out

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[80] [1923] A.C. 145.

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"or expended for the purposes of the trade," and that the Board of the Privy Council concluded their judgment by stating that the decisions on the English Income Tax Act, the language of which is different from that of the New Zealand Act, had no real bearing on the question then for decision. I do not think that the decision on the narrower words of the New Zealand Act is of great assistance here. It is interesting to note that the argument addressed to the Board by the taxpayer and rejected, having regard to the language of the New Zealand Act, was in the main that addressed to the court in this case. This argument found support in the speeches delivered in the House of Lords in *Usher's Wiltshire Brewery Ld.* v. *Bruce*,[81] interpreting the words of the Income Tax Act, 1842, which correspond with the rules now in force in this country. The argument was in substance that the expenditure in question did not differ in kind from that laid out on insurance.

I therefore turn to *Usher's Wiltshire Brewery Ld.* v. *Bruce*,[81] in which one of the disputed items related to fire and licence insurance premiums. The Court of Appeal had said that the fire insurance premiums were not wholly or exclusively laid out or expended for the purposes of the company's trade or business and were not legitimate deductions under Schedule D, being paid to insure the "fabric" to protect the landlords from loss by destruction of their property. It was pointed out that what was insured against was the destruction by fire of the houses. As to the licence insurance premiums, those, it was said, were paid to insure against loss of the licences in cases where no compensation was payable out of the compensation fund. It was held by the Court of Appeal that they were payable in the main, if not wholly, to protect the company, as owners of the property, from any diminution of the value of the houses as the result of the licences being taken away without any right to compensation. Later, the judgment continued by pointing out that the sums received under such a policy by the brewery company recompensed them for the diminution of the value of the property. Accordingly, both fire and licence insurance premiums were disallowed.

The judgment of the Court of Appeal appears to me to have proceeded on the same lines as the argument addressed to us by the Crown in this case. That judgment was, however, reversed by the House of Lords. Their Lordships were unanimous in holding that those items were not within the prohibition, but as a matter of law could be held properly to be "wholly "and exclusively laid out for the purpose of the trade." Lord Atkinson said in *Usher's Wiltshire Brewery Ld.* v. *Bruce*[82]: "... the purposes for which the insurances upon the premises "are effected are set out. They are found to be usual and proper "trade outgoings, and are made as such by the appellants. They "are designed to cover the loss of the fabric by fire and the loss "sustained if the licences were not renewed. *Smith* v. *Lion* "*Brewery Co.*[83] applies, I think, to the latter disbursement, and "the remarks I have already made apply to the former as well "as to the remaining items D and F."

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[81] [1915] A.C. 433.

In my opinion, the decision in *Usher's Wiltshire Brewery Ld.* v. *Bruce*[84] supports the view contended for by the respondent company in this case. It was, however, contended by the Crown that if the test laid down by the well-known dictum of Lord Davey in *Strong & Co. of Romsey Ld.* v. *Woodifield*,[85] is applied, the deduction ought not to be allowed. He said of the words "for the purpose of the trade" in the Act of 1842: "these "words ... appear to me to mean for the purpose of enabling a "person to carry on and earn profits in the trade, etc. ... It is "not enough that the disbursement is made in the course of, or "arises out of, or is connected with, the trade, or is made out "of the profits of the trade. It must be made for the purpose "of earning the profits."

The question, as Lord Porter pointed out in *Smith's Potato Estates Ld.* v. *Bolland*[86] is still left open as to what expense is incurred for the purpose of enabling a trader to earn profits. These words cannot be read literally. Fire insurance premiums on the premises in which the trade is carried on do not increase the profits, but are necessary to maintain the assets of the trade in a condition to earn profits. A fire may never happen, nationalization may never happen; but it is open as a matter of law, in my judgment, to find, as the commissioners have found in the present case, that the expenditure incurred in carrying out the propaganda campaign against nationalizing the sugar refining industry was wholly and exclusively laid out for the purposes of the company's trade, and was accordingly an admissible deduction for income tax purposes. It was laid out to prevent the

[82] Ibid. 452.

[83] [1911] A.C. 150.

[84] [1915] A.C. 433.

[85] [1906] A.C. 448, 453.

[86] [1948] A.C. 508, 520.

seizure of the company's business assets so as to enable the company to continue as in the past to earn profits in the trade carried on by the company.

I reject, therefore, the contention that the expenditure was laid out for purposes so indirect and remote from the trade carried on by the company that it was not in law open to the commissioners to find as they did. To use the language of Lord Cave L.C. in *British Insulated and Helsby Cables Ld.* v. *Atherton*,[87] in which it was held that a lump sum paid by a company to form a nucleus of a pension fund for its employees was capital expenditure and accordingly not deductible: "A sum of "money expended . . . voluntarily and on the grounds of "commercial expediency, and in order indirectly to facilitate the "carrying on of the business, may yet be expended wholly and "exclusively for the purposes of the trade." The point which prevailed in *British Insulated and Helsby Cables Ld.* v. *Atherton*,[87] namely, that the payment in question was a capital payment, was not taken before the commissioners in this case and was not argued in this court as a separate point. The passage which I have read from Lord Cave's speech appears to me to bear on the question to be decided in this case and to support the contention of the company.

In my opinion, the expenditure is a proper debit item to be charged against the incomings of the trade when computing the balance of the profits of it, and is none the less a proper revenue charge because it is laid out for the purpose of preserving the assets of the company. It is not, I think, a good answer to say that the asset is not in danger and the only question is a change of ownership. If the trader has his business taken from him by the State, whatever form nationalization may take, he cannot continue to carry on his trade. Accordingly, expenditure laid out in protecting himself against nationalization is directed towards enabling him to retain the trade which he is carrying on.

I would dismiss the appeal.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Solicitor of Inland Revenue; Pennefather & Co.*

E. D.

[87] [1926] A.C. 205, 212.

In re ABERCONWAY'S SETTLEMENT TRUSTS.
McLAREN *v.* ABERCONWAY AND ANOTHER.

[1950 A. 3059.]

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May 15,
18, 19.

Evershed M.R.,
Denning and
Romer L.JJ.

Settlement—Tenant for life—Powers—Provision affecting—Validity—Trusts for prescribed period—So long as property remains settled—Limitation over—Part of property sold by tenant for life—Whether limitation over provision discouraging tenant for life from exercising statutory powers—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 106.

By section 106 of the Settled Land Act, 1925: "(1) If in a "settlement . . . a provision is inserted . . . (*b*) attempting, or "tending, or intended . . . to prohibit or prevent . . . [the tenant "for life] from exercising, or to induce him to abstain from exer-"cising . . . any power under this Act . . . that provision, as far "as it purports, or attempts . . . or might have, the operation "aforesaid, shall be deemed to be void."

In 1926 certain funds were settled by reference to a settlement of 1921, with a proviso that if certain gardens, then belonging to the settlor, should become subject to the said trusts, then during such part of a period, limited to comply with the perpetuity rule, "as the said gardens shall be and remain settled as aforesaid" and subject to other specified conditions, the funds so settled in 1926 should be applied for the upkeep and development of the said gardens, but that after such "prescribed period," or if and so long as the other conditions were not complied with, the funds should go over on other trusts.

In the events which happened the gardens became subject to the trusts, but in 1949 the greater part was sold to the National Trust. Danckwerts J. held that the "prescribed period" of the settlement of 1926 had come to an end for the gardens had ceased to be settled, but the direction as to the limitation over was, he held, a direction which tended to discourage the tenant for life from exercising his statutory powers and it was, therefore, void, as offending against section 106 of the Settled Land Act, 1925. Accordingly, he held that the income of the settled fund remained settled for the purposes of the upkeep of the gardens during the remainder of the specified period. On appeal:—

Held, first, that "the said gardens" had ceased to be settled on the trusts of the settlement of 1921 and, therefore, prima facie, the "prescribed period" of the settlement of 1926 had come to an end, so that apart from section 106, the limitation over took effect.

Held, secondly (Denning L.J. dissenting), that the validity of the limitation over was not affected by section 106 of the Act of 1925. This was a trust for a quasi-public object and the cestui que trust did not derive any independent benefit from it, for he had on the facts, no effective control of either the management of the gardens or the application of the funds. The provision for the termination of the trustees' discretionary powers was not in those circumstances a deterrent provision of the kind contemplated by para. (*b*)

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of section 106, for that section did not operate to render void a direction in a settlement that certain provisions should be terminated on the happening of specified events if the provisions which might be so terminated were neither for the benefit of the cestui que trust nor ancillary to the enjoyment by him of the trust property.

Held, thirdly, that in deciding whether in fact a provision had or had not the effect contemplated by section 106, the particular idiosyncrasies of particular tenants for life were irrelevant, for the test was objective.

In re Patten [1929] 2 Ch. 276; 45 T.L.R. 504 followed.

In re Simpson [1913] 1 Ch. 277 approved.

Per Denning L.J., dissenting: The provision in the settlement to the effect that the income allocated to the upkeep of the gardens was to cease to be available for that purpose if part of the gardens were sold was within section 106 of the Settled Land Act, 1925, for it would tend to induce the tenant for life to abstain from exercising his statutory power of sale. That provision being, accordingly, void, the income was to be applied to the retained part of the gardens.

Decision of Danckwerts J. [1952] W.N. 526; [1952] 2 T.L.R. 796; [1952] 2 All E.R. 981 varied.

APPEAL from Danckwerts J.

By a settlement dated October 28, 1909 (the "Prestatyn "settlement"), an estate at Prestatyn, and elsewhere in the county of Flint, was conveyed by the settlor, the late Baroness Aberconway, to trustees (the first defendant, the second Lord Aberconway, and the second defendant, R. P. Johnson-Ferguson, being the present trustees) upon trust for sale and to hold the net proceeds of sale and investments for the time being representing the same upon the trusts therein expressed for the children and remoter issue of the settlor.

By a settlement dated September 15, 1921 (the "Bodnant "settlement") certain hereditaments in the counties of Carnarvon and Denbigh, known as the "Bodnant estate," with specified exclusions, were settled by the settlor upon trust for Lord Aberconway for life with remainder upon the trusts therein set out for the benefit of his issue and otherwise. The first defendant, the second Lord Aberconway, was the present tenant for life of that settlement. The part of the Bodnant estate excluded from the settlement comprised the mansion-house known as Bodnant Hall with its gardens and other property occupied therewith, but the extent of the exclusions was not precisely defined in the settlement.

By a settlement dated February 22, 1926 ("the garden "settlement"), after reciting the Prestatyn settlement and the

Bodnant settlement as being of "certain hereditaments in the "counties of Denbigh and Carnarvon known as the Bodnant "estate (except the messuage or mansion-house known as "Bodnant Hall with the gardens pleasure grounds and demesnes "usually occupied therewith and the home farm adjoining or "near thereto)," it was recited that "whereas the settlor [Lady "Aberconway] is seized in fee simple of the said mansion-house "known as Bodnant Hall with the gardens pleasure grounds and "demesnes usually occupied therewith And whereas the late "Henry David Pochin the father of the settlor and the settlor "herself encouraged the use of the gardens at Bodnant aforesaid "for the cultivation of a large collection of plants and flowers of "home and foreign countries of botanical and horticultural "interest and for experiments in the production and hybridization "of plants and of flowers of all kinds and it is the settlor's "desire that the gardens at Bodnant should continue to be used "for the cultivation production and hybridization of foreign and "domestic flowers and plants and the continuance of such experiments and the development of the results therefrom and the "settlor is of opinion that it may be necessary for the furtherance "of such objects that money should be expended in the erection "and heating of greenhouses for the growth of rare plants and in "other directions hereinafter more particularly mentioned And "whereas the said gardens at Bodnant aforesaid are visited by a "large number of visitors many of whom are specially interested "in horticulture . . ." the settlor, being desirous of making some special provision for the effectuation of the above-named purposes, had transferred certain shares to which she was entitled to the trustees of the settlement, and it was declared that the shares should be held upon trust for sale on certain named trusts with full power to postpone any such sale and to invest the proceeds in the manner therein provided, and there followed a direction that "the trustees shall hold the investments from "time to time representing the same . . . upon the same trusts "and with and subject to the same powers and provisions as "capital moneys subject to the Bodnant settlement of 1921 are "or might be held: Provided always that if the said gardens at "Bodnant shall be settled upon or shall be acquired by or become "vested in the trustees or trustee upon the trusts declared by "the Bodnant settlement of 1921 concerning the freehold hereditaments thereby settled or substantially upon the same "trusts" [it was conceded that that event had occurred]

" . . . then during so much of the lives of the children and grand-" children of the settlor living at the date of this indenture and " the lives and life of the survivors and survivor of them and the " period of twenty-one years from the death of such survivor as " the said gardens at Bodnant shall be and remain settled as " aforesaid or shall remain vested in the trustees or trustee (which " portion of the said period of lives and years is hereinafter " referred to as ' the prescribed period ')" [that period being such part of a period limited by reference to the rule against perpetuities as the said gardens at Bodnant shall be and remain settled] " the trustees or trustee shall," with the consent of the tenant for life for the time being of the Bodnant settlement apply the income of the settled property " in or towards securing and " assisting and developing the use of the said gardens at Bodnant " for the cultivation of plants and flowers of home and foreign " countries of botanical and horticultural interest and for experi-" ments in the production and hybridization of foreign and " domestic flowers and plants of all kinds and the continuance and " making of experiments in connexion therewith and the develop-" ment of the results thereof and for the purposes aforesaid the " trustees or trustee may with such consent as aforesaid " expend certain sums in the erection of greenhouses.

There followed a provision that they were not to be used for the purpose of growing certain fruits, and then the trust went on, " and the trustees or trustee shall have the complete and uncon-" trolled discretion as to the portion or portions of the said " gardens in which the income of the settled fund shall from time " to time be applied and as to the time of such application and " as to the mode of such application . . . and the trustees or " trustee shall have power at their or his discretion to impose as " a condition of the application of the income of the settled fund " or any part thereof for any of the purposes aforesaid that the " person or persons for the time being entitled to the possession " or receipt of the rents and profits of the said Bodnant estate " under the Bodnant settlement of 1921 shall permit visitors " either of a class specially interested in horticulture or possessing " any special qualification in connexion with horticulture or at " their discretion all visitors to visit and inspect the said " gardens " under certain conditions named, " as the trustees or " trustee may approve and if at any time [the tenant for life] shall " decline to allow the said income to be applied for the purposes " aforesaid . . . or to permit such persons as aforesaid to visit and " inspect the said gardens then and so often as the same shall "happen the trustees or trustee shall apply the income of the "settled fund as if the same were income of the property settled "by the Prestatyn settlement. . . ."

Finally, the ultimate limitation provided: "And it is hereby "agreed and declared that from and after the expiration of the "prescribed period the settled fund shall be held upon the trusts "and with and subject to the powers and provisions declared by "the Prestatyn settlement of 1909 or such of the same as shall "be subsisting and capable of taking effect"; thus making it plain that, as from the time when the gardens became settled, the tenant for life of the Bodnant settlement should, in no circumstances, according to the settlor's intention, be entitled to enjoy the income of the funds settled by the garden settlement as part of the subject-matter of the Bodnant settlement.

The settlor died on January 4, 1933. By clause 11 of her last will, dated December 2, 1931, she devised Bodnant Hall with its gardens, pleasure grounds and the adjoining home farm upon the same trusts as those declared by the Bodnant settlement of 1921. The trustees of the garden settlement, as provided by that instrument, decided and determined that the trusts declared by clause 11 of the will were substantially the same as the trusts declared by the Bodnant settlement.

The first Lord Aberconway died in January, 1934, and the first defendant, the second Lord Aberconway, thereupon succeeded as tenant for life, the Bodnant settled estate, together with Bodnant Hall and the gardens (which by virtue of the will of Lady Aberconway were then settled on the trusts of the Bodnant settlement) vesting in him as tenant for life in October, 1934. Owing to the incidence of taxation he found that it was difficult to maintain the gardens in the manner intended, and, accordingly, on November 11, 1949, a portion of the gardens was sold and conveyed to the National Trust. The portion so sold and conveyed was about 53 acres, and amounted to five-sixths of the gardens which had hitherto been cultivated in the manner contemplated by the garden settlement. At the same time as the conveyance, the first defendant transferred to the National Trust investments of his own to the value of about £36,000 to form an endowment fund for the upkeep of the part of the gardens conveyed to the National Trust; the whole income of the funds settled by the garden settlement being required to maintain the part of the gardens which was not conveyed to the National Trust.

The National Trust part of the gardens did not include any of the greenhouses or other parts which were used for experiment and research, but it included most of the parts to which the public had in the past been admitted. Plants raised in the retained portion of the gardens were planted out in the portion conveyed to the National Trust.

In these circumstances the question arose whether or not the "prescribed period," as defined in the garden settlement, had come to an end, and if so, whether, having regard to section 106 [1] of the Settled Land Act, 1925, the funds settled by the garden settlement, amounting to about £20,000, remained applicable in or towards securing and assisting and developing the use of the gardens at Bodnant.

Danckwerts J. held that since five-sixths of the gardens had been sold, it could not be said that the gardens remained settled, and that the "prescribed period" had, therefore, prima facie come to an end, but that, as the direction as to the "prescribed "period" was a provision tending to discourage the tenant for life from exercising his statutory powers, it was void by virtue of section 106 of the Settled Land Act, 1925, and accordingly, the "£20,000" settled by the garden settlement remained settled for the purposes of the upkeep of the gardens during the period of lives laid down in the settlement.

The second defendant, R. P. Johnson-Ferguson, for the trustees of the Prestatyn settlement of October 28, 1909, appealed.

C. Montgomery White Q.C. and *B. G. Burnett-Hall* for the appellant. Danckwerts J. was right in holding that "the prescribed period" under the garden settlement had expired by reason of the sale of 53 acres of the gardens, but was wrong in holding that section 106 of the Settled Land Act, 1925, applied so as to prevent the gift over on the trusts of the Prestatyn settlement from taking effect. It is submitted, first, that although section 106 may apply to the case where the property in question is settled by an instrument different from that under which the life interest arises, there is no authority for saying that this section applies to a settlement made before the land to which the life interest relates was settled. The final words of section 106 (1) make void a provision tending to prevent a tenant for life from exercising his powers. The trusts of the garden settlement cannot have been void ab initio, since Bodnant Hall and gardens were not settled when the garden settlement was made. Section 106 is directed to preventing interference with a tenant for life's powers under the Act. There cannot be any interference with those powers when the settlement creating them is not in existence.

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[1] Settled Land Act, 1925, s. 106: "(1) If in a settlement, will, assur-"ance, or other instrument executed "or made before or after, or partly "before and partly after, the com-"mencement of this Act a provision "is inserted—(*a*) purporting or "attempting, by way of direction, "declaration, or otherwise, to forbid "a tenant for life or statutory owner "to exercise any power under this "Act, or his right to require the "settled land to be vested in him; or "(*b*) attempting, or tending, or in-"tended, by a limitation, gift, or dis-"position over of settled land, or by "a limitation, gift, or disposition of "other real or any personal property, "or by the imposition of any condi-"tion, or by forfeiture, or in any "other manner whatever, to prohibit "or prevent him from exercising, or "to induce him to abstain from exer-"cising or to put him into a position "inconsistent with his exercising "any power under this Act, or his "right to require the settled land to "be vested in him; that provision, as "far as it purports, or attempts, or "tends, or is intended to have, or "would or might have, the operation "aforesaid, shall be deemed to be "void."

The second and main submission is that the provisions of the garden settlement could not deter the tenant for life from exercising his statutory powers, for the income of the garden settlement is not, and never was, sufficient for the maintenance of the gardens, and the trusts of the garden settlement were framed so as to avoid giving to the tenant for life any financial benefit. The settlement was intended to benefit the gardens as gardens and to promote horticultural pursuits. It was not incumbent on the tenant for life to continue horticultural experiments. He was free to use the gardens in any other way which would be to his greater pecuniary benefit. The settlement merely relieves him of expenses in connexion with the gardens, which he was never bound to incur. The trustees of the garden settlement have a discretion as to the way in which the money is to be spent. There is nothing in the settlement to prevent the tenant for life from selling. If he sells, the need for any subvention from the garden settlement ceases.

Thirdly, assuming that the first submissions are wrong, there is nothing in section 106 which justifies the court in altering the trusts of the garden settlement. The court cannot say that the income of the garden settlement should be paid to the tenant for life or that he should be paid some monetary equivalent: *In re Patten.*[2] As the tenant for life's occupation of the property would cease on sale, it must become impossible after such sale to carry out the trusts of the garden settlement with regard to the gardens, and, therefore, on sale the subject-matter of the trust disappears. It is submitted that *In re Burden*[3] was rightly decided and that it covers this case. The provisions of the garden settlement neither tend to deter the tenant for life from selling nor do they induce him to do so. The only deterrent is that, if he sells, he will not be able to pursue this horticultural hobby.

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[2] [1929] 2 Ch. 276; 45 T.L.R. 504.

Sir Lynn Ungoed-Thomas Q.C. and *H. E. Francis* for the respondent, the second Lord Aberconway. The appellant's submission that the limitation over is not void under section 106 unless it was void ab initio is incorrect. Section 106 makes void a limitation which tends at any time to deter a tenant for life from exercising his statutory powers when he would otherwise do so, and a provision will be void in so far as it has that effect. The garden settlement is on the footing that the money will be used for the gardens, and the question is whether, assuming that the tenant for life has consented to the trusts being carried into operation, the knowledge that if he exercises his statutory powers at any time the income would no longer be available to him, for the upkeep of the gardens would be a deterrent to him. Section 106 comes into operation only after the stage has been reached when the tenant for life has accepted the money because he desires to apply it for the upkeep of the gardens. Section 106 is not limited to applying to provisions which are for the personal benefit of the tenant for life; the test is whether, for whatever reason, the limitation over is a deterrent. In the present case, it is reasonable to suppose that Lord Aberconway, having consented to the trusts coming into operation, would wish to keep up the gardens, and if a sale of part of those gardens involves losing the income available towards the cost of maintaining the gardens that would tend to induce him not to sell.

In re Simpson[4] must be read as interpreted by Lord Romer in *In re Patten.*[5] In both those cases the court was clearly of opinion that the provision over was void, but the difficulty was what should be done with the funds as it was physically impossible to carry out the trusts once the house to which the benefits applied had been sold, and the court held that it was not permissible to rewrite the trusts so as to provide for that event. But that is not the difficulty here, for the income is to be applied in and "towards" the upkeep of the gardens, for securing and assisting towards their development. That does not necessarily mean all of the "said gardens," and Danckwerts J. was right when he said that the sale did not destroy the subject-matter of the trusts, so that notwithstanding the sale the trusts still remain and as the trustees have a discretion as to the portion of the gardens to which they will apply the funds, the income can be used for the part still retained.

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[3] [1948] Ch. 160; [1948] 1 All E.R. 31.

[4] [1913] 1 Ch. 277.

[5] [1929] 2 Ch. 276.

The sale was necessary because it was impossible to keep up all the gardens with the money available (though Lord Aberconway had made available a sum additional to the income of the settled fund). The trustees were a party to the sale. It would be a capricious result to hold that the income was lost because of the sale (especially as the purchaser will maintain, in the manner contemplated by the settlor, the part of the gardens which has been sold) whereas the income might have been retained if that part of the gardens had not been sold but had been permitted to become derelict. The trustees can control the exercise of the power of sale by their discretionary power of applying the income to whichever part of the gardens they think fit, so that they could refuse to allow the income to be applied so as to dovetail with a sale to which they had objected, but here they have consented to the sale and are a party to the conveyance.

[ROMER L.J. Danckwerts J. seems to have interpreted the "said gardens" in two different ways, for he said, first, that on the sale the "said gardens" were no longer settled, although later he said that the retained part was the "said gardens" for the purpose of having the income of the fund spent on it.]

He applied section 106 and found that it cancelled the limitation over. Then he decided that it was within the trusts to apply the funds to part of the gardens only because the fund was to be applied "in and towards securing the use of the said gardens." It is submitted that the trusts continue as though the "said "gardens" had not ceased to remain settled, throughout the prescribed period. It is further submitted that the gardens have not in fact ceased to be settled, for on a "commonsense" construction, the "said gardens" means "the gardens for the time "being" occupied with the house. The "gardens" are not specifically defined anywhere in the documents. The gardens occupied with the house might vary from time to time, and there is nothing which confines the expression "the gardens" by reference to a particular moment, whether at the time when the settlement was made or at any other time. The gardens were in fact added to after the settlement was made, and before the

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death of the settlor. It is clear that the settlor was concerned with the use of the gardens for the time occupied with the house.

To decide whether the "gardens" are still settled regard should not be had to the area retained, but to the purpose of the settlor and to how far that purpose can still be carried out. The purpose of the settlement was the pioneer horticultural work, and all the vital experimental work is still being carried on in the part of the gardens which has been retained and to which it is proposed to apply the income of the fund, and for the proper upkeep of which all that income is, in fact, required. The part which has been sold is not the core of the scheme, though the plants grown in the experimental area will, by arrangement, be used in the part sold to the National Trust.

H. E. Francis following. If it is decided that the "said "gardens" means substantially the whole gardens, then the prescribed period would come to an end on the sale of a substantial part of the gardens. If that were so, it would clearly be a deterrent to the tenant for life exercising his power of sale as regards a part only of the land because if he did so the whole burden of the cost of maintaining the remainder would fall on him. Therefore, if the appellant is right on the construction, the limitation over will be void as offending against section 106, for a provision is within that section if it tends to induce the tenant for life not to exercise his powers as regards a part only of the land. In *In re Simpson* [6] and in *In re Patten* [7] the whole of the land was sold, and the loss of the funds available for the payment of outgoings did not deter the tenant for life from selling the whole, since in that event the funds ceased to be required. It is begging the question to describe the trust for the maintenance of the garden as an extra benefit (as in *In re Simpson* [8]). The provision in question in *In re Eastman's Settled Estates* [9] could have been described as an extra benefit, but that did not save it.

Section 106 refers to a limitation which "might" have a deterrent effect. It is a question of fact in each case whether, in the particular circumstances, the tenant for life is deterred. Lord Aberconway is entitled qua tenant for life to use part of the settled land for the purposes of the gardens, and the limitation over tends or might tend to deter any tenant for life so minded from selling part of the gardens. If the limitation over is within section 106, as is submitted, then it is within the trusts to apply the income

[6] [1913] 1 Ch. 277.

[7] [1929] 2 Ch. 276.

[8] [1913] 1 Ch. 277.

[9] (1899) 68 L.J.Ch. 122; [1898] W.N. 170.

for the retained part. But if the " gardens " means substantially the whole gardens, then that trust cannot operate and the primary trust comes into operation, for the proviso displaces it only in so far as is necessary to bring into play the trust for the application of the income,—and, if that cannot be carried out, the primary trust will take effect. Under the primary trust, Lord Aberconway would receive the income as tenant for life of the Bodnant Settlement.

Montgomery White Q.C., in reply. The test for deciding whether a provision is deterrent within section 106 is objective, the preferences of a particular tenant for life are irrelevant. The provision must be shown to be void ab initio without regard to the person who happens at any particular time to be the tenant for life—otherwise a provision might be found to be valid at one time and invalid at another.

The argument submitted for the respondent conflicts with *In re Patten*,[10] *In re Burden*[11] and *In re Simpson*.[12] There is a distinction between provisions which terminate a direct pecuniary benefit, such as an annuity to a tenant for life as long as he lives in a specified house, and those which confer some additional benefit on the tenant for life because he lives in a particular house. In *In re Patten*[13] the furniture could be enjoyed in specie but the trust for upkeep could not. If it is assumed against the appellant's submission that section 106 operates to make the provision void, the funds will, nevertheless, still go over to the Prestatyn settlement, because the " gardens " having ceased to be settled, the funds cannot be applied for the upkeep of the " said " gardens." The primary trust does not operate, for that was brought to an end, so far as the gardens are concerned, when they were brought into settlement, and this is not a case which can be construed on the principle laid down in *Hancock* v. *Watson*.[14] In effect, the sale means that the tenant for life has superimposed his intentions as to the management of the gardens on the trustees' discretion, for even if they consent to the sale, they are attempting to bind the future exercise of their discretion, and in substance the effect is the same as that contemplated by the proviso to the settlement.

The respondent has relied on the use of " towards " the upkeep of the said gardens, but that is merely an indication that the settlor thought that the income provided might be insufficient to cover the cost of the whole upkeep. As the cost of the upkeep of the gardens exceeds the income provided, the tenant for life is not in fact deriving any "benefit" which might be terminated by the sale. This is a semi-public trust, and the provision does not deter the exercise of the powers of the tenant for life. If the respondent's contention be correct, it would mean that a tenant for life could sell and take all the proceeds and the income of the fund freed from the settement, but that result is plainly contrary to the intention of the settlor. The particular identity of the purchaser and the use to which the land will be put by him are irrelevant considerations in deciding whether section 106 applies. Once the gardens have ceased to exist as an entity as envisaged by the settlor, it is as impossible for the trustees to carry out the trust as if the tenant for life had declined to allow the income of the fund to be applied for the upkeep of the gardens, and in both circumstances, the limitation over applies.

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[10] [1929] 2 Ch. 276.
[11] [1948] Ch. 160.
[12] [1913] 1 Ch. 277.
[13] [1929] 2 Ch. 276.
[14] [1902] A.C. 14.

EVERSHED M.R. The problem to which this appeal gives rise is one of considerable difficulty and springs from most unusual circumstances. [His Lordship stated the facts and continued:] The first problem which has arisen is whether, according to the construction of the garden settlement of February 22, 1926, the "prescribed period" has come to an end, as a result of the sale of the bulk of the gardens to the National Trust. If it has come to an end, then, according to the language of the garden settlement, the result will be that the £20,000 will go over so as to be held by the trustees of Prestatyn settlement on the trusts of the Prestatyn settlement. If it has not come to an end, then, prima facie, the particular or special trust continues, and the trustees will, no doubt, apply the income of this fund, or so much of it as they think fit, towards the cultivation of, and otherwise in regard to, the retained part of these gardens.

If, according to the true construction of the garden settlement, the effect of the sale to the National Trust has been to terminate the "prescribed period" in the garden settlement, it is submitted on behalf of the respondent that the relevant provision of the settlement is a provision or disposition which offends against the terms of section 106 of the Settled Land Act, 1925, and it must, therefore, be treated as void. On that view, it is argued, the result is either that the trustees of the garden settlement should continue to apply the income of the £20,000 for the retained part of the gardens, or that the £20,000 will again become part of the Bodnant settlement funds, the income of which will be enjoyed by the present tenant for life, Lord Aberconway.

Danckwerts J. came to the conclusion on the first question that, according to the true construction of the garden settlement, the "prescribed period" had come to an end as a consequence of the sale; but (on the second question) he thought that the provision of the garden settlement, which caused it so to do, was offensive to section 106, and he concluded in favour of the first alternative consequence which I have mentioned, namely, that the trustees continued to be entitled to the possession and to the disposition of the income of the £20,000. In his view the trustees were entitled to apply the income of the fund to the retained part of the gardens, and, perhaps also (though he did not so decide), to apply it towards the cultivation of that part of the gardens which had been sold to and was the property of the National Trust. Against that decision the second defendant (one of the trustees of the Prestatyn settlement) has appealed.

I must now refer to the terms of the garden settlement, which, in my opinion, was correctly construed by Danckwerts J. [His Lordship referred to the terms of the settlement of February 22, 1926, as set out above and continued:] It is nowhere stated, either in this document or in the Bodnant settlement of what exactly the "gardens" at Bodnant consisted. The phrase used is: "gardens, pleasure grounds and "demesnes usually occupied therewith," that is, with Bodnant Hall. Sir Lynn Ungoed-Thomas suggested that it might mean, "from time to time occupied therewith"; but I do not think it does so signify, and, if it did, it would create the difficulty that if Bodnant Hall was sold, it would follow that none of the gardens would be occupied therewith, so that, in that event, the special trust would, automatically, come to an end. But I think that the court is entitled, and indeed bound, in order to discover what was meant by the "gardens," to take account of the evidence of what in fact were the "gardens" which were described in this settlement, being gardens (as the settlor states in her recital) which had been applied towards the cultivation of rare flowers, shrubs, and so forth. [His Lordship referred to a plan, exhibited to one of the affidavits, showing the gardens at the date of the settlement and as they had since been maintained. He continued:]

From this plan it appears that the total area of these gardens was, in 1926, approximately 68 acres. In 1949 some 53 acres were sold to the National Trust, leaving 15 acres unsold. It is, I think, not open to doubt that a sale of an unsubstantial part of these gardens could not affect the problem which we have to consider. But as 53 out of 68 of the acres have been sold, the first question of construction is whether it can now be said that the gardens, which are described as "the said gardens at Bodnant," are still settled under the terms of the Bodnant settlement.

Obviously the matter does not permit of much elaboration. Danckwerts J. decided, on the construction of the deed of 1926, that it could no longer be said that "the said gardens" were, and remained, subject to the settlement, when, in fact, 53 out of 68 acres had been sold; and I agree with that conclusion. It seems to me, in other words, that construing this settlement so as to extract from it its own definition of terms, "the "said gardens at Bodnant" mean the subject-matter which is illustrated on the [exhibited] plan and which the settlor had described in the earlier recitals. It follows, therefore, that (unless section 106 of the Settled Land Act applies so as to alter the result) the prescribed period of the garden settlement has come to an end, for the period was only that part of the perpetuity period during which the "said gardens" remained settled according to the terms of the Bodnant settlement. Prima facie, therefore, and apart from the effect of section 106 the last provision in the garden settlement will come into operation, and, the prescribed period having expired, the settled fund should be held on the trusts of the Prestatyn settlement.

Section 106 of the Settled Land Act, 1925, is (so far as relevant) a re-enactment, without alteration, of section 51 of the Settled Land Act of 1882. [His Lordship read the first subsection of section 106 and continued:] It is clear that paragraph (*a*) refers to a direction in express terms seeking to forbid the tenant for life from exercising any of his statutory powers, whereas (*b*) relates to provisions which may have a similar effect obliquely. There is no question that we are not concerned with paragraph (*a*) in this case, because there is no direction or similar provision within the meaning of that paragraph. The question is whether the very generous language of paragraph (*b*) is such as to affect some, and, if so, which of the dispositions in this settlement so as to render them void.

Certain things may, in my judgment, be stated as clear. It cannot, I think, be relevant to consider the particular personality or the particular inclinations of the tenant for life for the time being. Obviously a tenant for life who has particular interests or particular hobbies may have his mind affected so as to deter him from doing one thing or another, whereas another tenant for life with dissimilar tastes would be quite unmoved by similar considerations. Equally, as it seems to me, it must be quite irrelevant that, in the events which have happened, the part of the gardens which had been sold is now vested absolutely in the National Trust. It appears that the National Trust are continuing the upkeep of the gardens; and, in fact, Lord Aberconway has provided the National Trust with an endowment of £36,000 to that end. But in testing whether paragraph (*b*) operates so as to render void any part of this settlement, I think that the provisions have to be considered objectively, and Sir Lynn Ungoed-Thomas did not contend to the contrary. Any other view, it seems to me, would produce absurd results, because the same provision would be held void at one moment and fully effective at another, according to the particular circumstances and characteristics of the particular tenant for life. It is necessary, in my judgment, to have regard to the fact that the sale might well have been, not to the National Trust, but, for example, to a farmer who would be using the land for agricultural purposes, or to an industrialist who might be using it for mining or other industrial purposes.

Danckwerts J. who concluded that section 106 did render void that part of the settlement which caused the limitation over to the Prestatyn settlement to take effect, expressed the view that, as a consequence, the trustees of the garden settlement were entitled to apply the income of the £20,000 exclusively to the retained part of the gardens—for which, indeed, it is required; and he thought also that it might be (though he expressed no conclusion) that they could apply the income of the £20,000 towards the upkeep of that part of the gardens which was now vested in the purchasers, the National Trust.

It seems to me that that part of the judge's conclusion is open to the objection that it involves construing the words, "the "said gardens at Bodnant," in a sense quite different from that in which he had construed them for the purpose of deciding whether, according to the terms of the trust, the "prescribed period" had come to an end. Such a construction does not seem to me to be legitimate. If the judge was right (and I think that he was) in saying that "the said gardens" no longer remained settled as aforesaid, then it seems to me to follow that the phrase, "the said gardens," must mean substantially the whole of the said gardens, when used in the later part of the particular trust—" in or towards securing and assisting and " developing the use of the said gardens at Bodnant for the cultivation of plants." Mr. Francis argued that, assuming that the earlier phrase (which cut down the perpetuity period) must be treated as void, then since the words " the said gardens " must bear the same meaning throughout, the special trust had become impossible of performance; with the result that (in the absence of any provision covering that event) the original or first trust persisted and, accordingly, Lord Aberconway was now entitled as tenant for life of the Bodnant settlement to enjoy the income of the £20,000. No doubt he would (as far as I know, he certainly would) apply it towards the upkeep of the gardens; but still he would be entitled beneficially to the income. The trustees would, on this view, have no further control or interest in the matter.

If that view be right, then it follows that the one thing which (as it seems to me) the settlor made quite clear she did not wish to happen—namely, that after the settlement of the gardens the beneficiaries under the Bodnant settlement should have any claim to any part of the £20,000 or to income produced by it—would have happened. But the argument is not without serious force, for if it is the fact that these trusts have become incapable of performance, then there is nothing in the deed which, so far as I can see, makes provision for that event, so that, prima facie, the original or primary trust would take effect. That argument seems to me to have a strong bearing on the determination of the question whether section 106 applies in this case at all.

An argument was put forward by Mr. Montgomery White (though not, I think, strongly pressed) that section 106 could not apply in the circumstances of this case because if a provision is to be deemed to be void, it must be deemed to be void ab initio; and since this settlement was executed in 1926 but had no truly effective operation until 1933, that condition could not here be satisfied. I hope that I have properly apprehended the argument, but I do not accept it, and will say no more about it.

There is no doubt that the language of paragraph (*b*) of section 106 is of very wide import. But some limitation, I think, must be placed on it; for it cannot have been the intention of Parliament to put an almost unlimited restriction on the powers of persons desiring to make settlements of their own property in the way they think best. Indeed, in the cases which have been decided upon this section and upon its predecessor (to which I shall briefly refer in a moment) such a limitation clearly emerges, and that limitation is in addition to the limitation which follows from what I have already said, namely, that the section must be construed objectively and not by reference to the particular idiosyncrasies of particular tenants for life.

The first thing, of course, is to determine what is the limitation in this settlement which is said to have the prohibited deterrent effect. It may be a criticism of the respondent's argument that there is no clear agreement between Sir Lynn Ungoed-Thomas and Mr. Francis as to which is the power, or disposition, or limitation in this settlement in which they say is the vice which renders it void. I think that they are inclined to favour the words " as the said gardens at Bodnant shall be and remain settled as " aforesaid "; in other words, they would treat the prescribed period as covering the whole perpetuity period and strike out the further limitation imposed by the words which I have quoted. I think that that view involves them in the serious difficulty, which I have already adumbrated. According to this view, even if the whole of the gardens were to be sold, the prescribed period would, nevertheless, continue: yet, beyond any question, the special trust which was limited to operate during that period, would have come to an end. That would leave the deed with a serious lacuna in it, for there is no provision whatever in the event which I have supposed for the disposition of the income of the £20,000 during the remainder of the perpetuity period. Counsel for the respondent can only escape from that difficulty by praying in aid the overriding operative effect of the primary trust, or possibly by having resort to a resulting trust in favour of the settlor. An alternative view put forward on the respondent's behalf is that the final limitation is void, or perhaps that the final limitation and the provision already quoted are together void, or void to some extent. It may be that a difficulty in discerning the precise provision which is avoided is not fatal to an argument based on section 106; but I think that it is a serious objection to such an argument, for prima facie section 106 cannot be invoked if the result is to require the substantial re-drafting of the main operative parts of a settlement or other instrument, or otherwise to alter substantially its expressed purpose and effect.

Of course the argument as now presented by Sir Lynn is made attractive by the particular circumstances of the present case. One cannot be unmoved by the considerations which now affect the mind of Lord Aberconway as Sir Lynn has presented them to us. The income produced by the settled £20,000 has not for many years been sufficient to endow the whole 68 acres. It is all required to maintain the retained part of the gardens in which, as Sir Lynn says, the core of the garden enterprise is situated, for it is there that the breeding of the plants takes place and the greatest exercise of horticultural skill is to be found. It is natural to feel sympathy for Lord Aberconway if the effect of this settlement, in the events which have now happened, is to deprive him of the means (at any rate) of influencing the use of the income of this £20,000 towards this garden enterprise, and if the events as they have now happened were the sole consideration, it might be possible to pick out or excise from the settlement such words only as would be necessary to meet the present situation. But in my judgment it is a mistaken approach to place too much emphasis on the particular circumstances which have arisen. What may be thought just and reasonable at the present time might turn out to be very unjust and unreasonable in ten years' time when conditions might be quite different. In any event, as it seems to me, the argument of Sir Lynn and Mr. Francis, or at any rate one aspect of it, leads to a conclusion which is so patently in conflict with the settlor's intention that I perhaps find less difficulty than I otherwise might have found in putting aside emotional considerations and applying myself to what I conceive to be the duty of the court, that is, to construe the terms of this deed as they have been written, and also to construe, according to the ordinary sense of the language used, section 106 of the Settled Land Act, 1925.

I have already done my best to perform the first part of that task, and fortunately, in applying myself to the second part, I am not without guidance in authority. Two cases seem to me to be of great assistance to the court in this matter: *In re Simpson*,[1] decided by Swinfen Eady J. and *In re Patten*,[2] which was decided in 1929 by Romer J. In my judgment neither section 51 of the Act of 1882, nor section 106 of the Act of 1925 (which has replaced it), should be taken as operating to render void directions in a settlement operating to determine other provisions in the settlement which are neither for the benefit (properly speaking) of any cestui que trust nor even, in strictness, ancillary to the enjoyment by a cestui que trust of the trust property.

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[1] [1913] 1 Ch. 277.

[2] [1929] 2 Ch. 276; 45 T.L.R. 504.

In this case the provisions of the garden settlement, during the prescribed period, of what I have called the special trust may no doubt be regarded as being indirectly for the benefit of the tenant for life, at any rate so long as the tenant for life happens to enjoy the amenities of a good garden or happens to be an amateur of horticulture. But it is important to bear in mind that the application of the income is wholly in the discretion of the trustees. The trustees were, indeed, required to obtain the consent of the tenant for life, and that was natural enough. But if the tenant for life (for reasons however good to him) did not give his consent to what the trustees proposed, then the whole fund went over, until he should change his mind, to the Prestatyn settlement.

It was said in argument that, if the appellant were right, the tenant for life could allow the whole of the gardens to go to rack and ruin without incurring the risk of causing the prescribed period to determine; whereas that result would immediately follow upon a sale by him of any substantial part of the gardens. But, in my judgment, that argument involves a misconception, a failure to apprehend that the management of the gardens is a matter for the trustees in their discretion. The tenant for life is not entitled to touch a penny of the income of the £20,000, nor to direct its application. He may, indeed, decline to consent to any application which the trustees may propose. But, in that event, by virtue of the later provisions of the deed (unless in some way they, also, are void, which was not suggested) the fund goes over to the trustees of the Prestatyn settlement. This trust is a trust for a very special and particular object, not, as I assume, a charitable object, but a public object of somewhat similar character. Provisions, therefore, which have the effect of putting an end to it, seem to me to be very far removed from provisions which have the effect of putting an end to a trust under which a cestui que trust received some independent benefit until he exercised a statutory power.

That distinction is, I think, inherent in the first of the two cases which I have mentioned, that of Swinfen Eady J. in *In re Simpson.*[3] In that case there was a bequest of a leasehold house to the testator's widow for occupation during her widowhood, together with a provision that, during her occupation, the rent, rates and outgoings, including repairs, should be paid for out of the general estate. The question was raised whether that limitation of the trustees' obligation to pay rent, and so on, during the widow's occupation could be said to be something which was a deterrent to the tenant for life's exercise of her statutory power of sale. Swinfen Eady J. gave a negative answer to that question. He said[4]: "In my judgment the provision for payment of rent and outgoings does not fall within section 51 at all. It is merely an extra benefit conferred on the widow to enable her to reside in the house without the expense of these outgoings. It is true that while she was in occupation she was free from these outgoings, but I am of opinion that the provision conferring this extra benefit on her was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of section 51."

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[3] [1913] 1 Ch. 277.

In re Simpson[5] was decided in 1913. Its effect was to put a limitation on the very broad language of what was then section 51 (1), to the effect that the deterrents contemplated in the section did not comprehend amenities and extra benefits of the kind to be found in *In re Simpson*,[5] which, however much they might obliquely affect the mind of a tenant for life (for she would not get them if she sold the testator's house and bought herself another), did not serve to bring into operation the language of the section so as to enable the tenant for life to require the continued payment of a sum equivalent to the previous outgoings after exercise by her of her powers of sale; a result which would have required (as in the present case) a substantial recasting of the beneficial trusts.

Parliament knowing (as we must assume that it knew) of that limitation put upon section 51 by the courts, re-enacted the section in the same terms in 1925. Prima facie, therefore, the courts must construe section 106 in the way in which the previous section had been construed before it was re-enacted. But in any case Romer J. in *In re Patten*[6] in 1929 expressly approved the language and reasoning of Swinfen Eady J. In my judgment that reasoning applies a fortiori to the present case.

My conclusion, therefore, with all respect to Danckwerts J., is that the provision putting an end to the trustees' discretionary power to apply the income in furtherance of this very special and "quasi-public" trust, is not a deterrent; it is not a provision tending to induce the tenant for life not to execute any of his statutory powers, of the kind contemplated by paragraph (*b*) of section 106 (1), and, therefore, no part of the relevant terms of this garden settlement ought to be deemed to be void within the meaning of that section.

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[4] [1913] 1 Ch. 277, 282.

[5] [1913] 1 Ch. 277.

[6] [1929] 2 Ch. 276.

The result, in my opinion, is that this settlement should take effect according to its terms, and if I have construed those terms correctly, the result will be that the £20,000 must now be held upon the trusts of the Prestatyn settlement. For these reasons, though I acknowledge the difficulty of the case and (if I may say so) the force of Sir Lynn Ungoed-Thomas' argument, I think that this appeal ought to be allowed.

DENNING L.J., after referring to the facts, said: It is apparent that all this discussion has come about because the person who drew up the settlement in 1926 made a mistake. He did not foresee what would have to be done twenty-three years later in order to keep the gardens in being; he did not foresee that part of them might have to be conveyed to the National Trust. Speaking for myself, I would forgive him for making such a mistake, because I do not think that draftsmen of deeds can be expected to foresee everything, any more than draftsmen of Acts of Parliament can be expected to do so. In those circumstances I would have liked, if it could have been done, to have moulded the language of the settlement of 1926 so as to give effect to what I feel were the wishes of Lady Aberconway, by making it apply, not only to the gardens as they stood in 1926, but also to any substantial part thereof, and the retained part is certainly a substantial part of them. But I am afraid that our strict rules of construction—and here I agree with Danckwerts J.—do not permit of such a moulding. However, I agree with him that the same result can be reached by resort to section 106 of the Settled Land Act, 1925.

In approaching section 106 the first question is, what is the "provision" which is in question in this case? It is, I think, the provision by which the court is bound, on a strict construction of the settlement, to say to Lord Aberconway: "If you sell "a part of the gardens in the exercise of your powers as tenant "for life, the income allocated to the gardens will cease alto-"gether." By way of contrast it should be noticed that if Lord Aberconway should allow a part of the gardens to fall into disuse, no such forfeiture would be incurred. The whole income would continue to be available for the gardens. In those circumstances if a provision to the effect I have stated were inserted in the settlement in plain terms, it would, I think, obviously tend to induce Lord Aberconway to abstain from exercising his power to sell a part. It would mean that, rather than do the sensible thing of selling a part of the land, he would hold on to the whole and neglect a part. That seems to me to be the very thing which section 106 was designed to avoid. The provision which I have stated is not expressed in plain terms in the settlement, but it is the construction which the court feels bound to put upon it. It cannot make any difference, however, whether the provision is expressed in plain terms or in obscure terms. By the statute it is deemed to be void.

That leads to the most difficult question in the case, that if the provision is avoided, what happens to the trusts of the settlement? They cannot remain intact. The settlement says that the income is to be applied to "the said gardens," that is, to the whole gardens. After part has been sold, that trust cannot be fulfilled to the letter: but the court ought not, on that account, to let the trust fail absolutely. It would be most unfortunate if, when Parliament has enacted that a provision for forfeiture is to be avoided, the courts were to re-establish it by saying that the letter of the original trust must still be fulfilled. By so doing the courts would, indirectly, insist on the forfeiture which Parliament had abolished. Parliament must have intended that the trusts should be modified, so far as necessary to meet the new situation: or in other words, to such an extent as is necessary to avoid the forfeiture. The words "as far as" in the section support this view, and I find nothing in the cases to deny it.

In *In re Patten*,[7] Romer J. modified the trusts so as to let Mrs. Patten have the use of the furniture even after she had left the house. I recognize that in some cases no modification will be of any avail, and that the trusts will fail for want of any content. That is what happened about the money for rates and repairs in *In re Simpson*,[8] *In re Patten*,[9] and *In re Burden*,[10] After the house had been sold, the money could not be spent on rates or repairs to it, and so the trust failed altogether. Those cases would be applicable in the present case if Lord Aberconway had sold the whole of the gardens. The income could not then be spent on the gardens at all. The objects of the settlement would cease and the income would fall back into the Prestatyn settlement. But Lord Aberconway has not sold the whole. He has sold only a part, and the objects of the settlement can be well carried out in the part that he retains.

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[7] [1929] 2 Ch. 276.

[8] [1913] 1 Ch. 277.

[9] [1929] 2 Ch. 276.

[10] [1948] Ch. 160; [1948] 1 All E.R. 31.

In his affidavit Lord Aberconway said: "To continue the "work which has in the past been, and is still being, carried "on in the retained part of the gardens will, in my opinion, "require an annual expenditure equivalent to the whole of the "income of the garden settlement fund." He went on: "The "continuance of such work is essential if the area as a whole is "to continue to fulfil the purposes indicated in the recitals to "the garden settlement as being the 'objects' for which the "gardens were endowed. Such work can only be carried on "effectively in the retained part of the garden." It seems to me on that evidence that the trusts which were originally intended by the garden settlement can be carried out now in the retained part. The only modification necessary in the trusts is to make them apply to the retained part instead of to the whole gardens. That is, I think, quite permissible.

I find myself, therefore, in agreement with Danckwerts J. and I would dismiss the appeal.

ROMER L.J.: The judgment which the Master of the Rolls has just delivered expresses my views upon this appeal so precisely that there is little that I can add. It seems to me that to accept the argument which was presented to us on behalf of the respondents involves our disapproving the reasoning of Swinfen Eady J. in 1913 in *In re Simpson,*[11] to which the Master of the Rolls has referred. The decision in that case was the law until 1925, when the provisions which existed in 1913 under section 51 of the Settled Land Act, 1882, were re-enacted without any relevant alteration by section 106 of the Settled Land Act, 1925, from which I gather that the legislature did not think it necessary or proper to disturb the law as laid down by Swinfen Eady J. In 1929 Romer J. in *In re Patten,*[12] expressly approved the reasoning of Swinfen Eady J. in *In re Simpson.*[13] I, myself, in the Chancery Division in 1948, in *In re Burden,*[14] in addition to recognizing that I was bound by these previous decisions, expressed my belief that they were right, and I take the opportunity in this court of affirming that view.

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[11] [1913] 1 Ch. 277.

[12] [1929] 2 Ch. 276.

[13] [1913] 1 Ch. 277.

[14] [1948] Ch. 160.

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Romer L.J.

The case before Swinfen Eady J. of *In re Simpson*[15] was one in which indirect benefits of a substantial character were conferred on the tenant for life of a leasehold dwelling-house which was the subject-matter of the specific bequest which the testator made in favour of his widow. Under that bequest there was a direction that she should have the right to occupy the dwelling-house during her life and that the trustees should pay the ground rent and all rates, taxes and outgoings payable in respect of the dwelling-house and doing all necessary repairs, it being his wish that his wife should be personally relieved from the payment of the ground rent, rates, taxes and outgoings, cost of repairs, and the observance and performance of certain covenants.

Notwithstanding the considerable degree of benefit which derived from that bequest to the widow, Swinfen Eady J., in the passage to which the Master of the Rolls referred in giving judgment, said: " The provision for payment of rent and outgoings " does not fall within section 51 at all." He continued[16]: " It is " merely an extra benefit conferred on the widow to enable her to " reside in the house without the expense of these outgoings. It is " true that while she was in occupation she was free from these " outgoings, but I am of opinion that the provision conferring " this extra benefit on her was not a provision tending to induce " her to abstain from exercising her statutory power of sale within " the meaning of section 51."

If that view be right (and I believe it to be) it is much clearer in my opinion that the provisions in the present settlement are not within section 106 of the Act of 1925. As I have already pointed out, in *In re Simpson*,[15] the benefits attaching to the house—and I say " to the house " with deliberation, because they were not attached to the income of the life tenant as an accretion to such income—were considerable benefits and such as might be expected to operate on a person's mind in deciding whether to sell or not, because if she sold she would lose the benefits. Nevertheless, as I say, it was held (and, I think, rightly held) that they were outside the Act.

By the provisions which were attached by Lady Aberconway's settlement to the gardens, the trustees were to have " the " complete and uncontrolled discretion as to the portion or " portions of the said gardens to which the income of the settled " fund shall from time to time be applied and as to the time of

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[15] [1913] 1 Ch. 277.

[16] Ibid. 282.

"such application and as to the mode of such application." Therefore, the management of the gardens, so far as this income was concerned, was taken out of the hands of the tenant for life and vested in the control of the trustees. In addition, the trustees were to have power " at their or his discretion to impose " as a condition of the application of the income of the settled " fund " that visitors of categories to be selected by the trustees, and nobody else, should be entitled to visit and inspect the gardens. It was further provided in that connexion that if the tenant for life declined " to allow the said income to be applied " for the purposes aforesaid or to permit such persons as aforesaid to visit and inspect the said gardens," the income was to be diverted elsewhere. It might suit some people to have gardens under the control of other people who had the sole right to say whether visitors should be allowed in, whether the public should be allowed to wander about, and to have no say themselves as to the manner in which the gardens should be run, but such persons, I venture to think, would have to be ardent horticulturists and be persons who were prepared to accept with philosophy the views of other people as to the manner in which the gardens should be run, rather than their own.

It is the income with all those fetters attaching to it which is the subject of this disposition, and the loss of which it is suggested would operate so as to deter the tenant for life from exercising the statutory power of sale. If that be so, it is plain that Swinfen Eady J. was wrong in *In re Simpson.*[17] I am quite satisfied that this provision in regard to the income and the gift over of the income if the gardens ceased to be carried on in the way that was contemplated, is not within section 106 of the Settled Land Act, 1925, at all, and, accordingly, that the effect of the sale which the tenant for life carried out was in no way interfered with by the section, notwithstanding the fact that the income would no longer be applicable to the gardens.

I am, therefore, of opinion, as my Lord has already indicated, that section 106 is outside this case altogether. If that be so, the rest follows as a matter of course. The tenant for life sold five-sixths of the gardens. Danckwerts J. below held (and, in my opinion, rightly held) that if five-sixths of gardens of this character are sold, then it is impossible to say that " the " gardens " still remain, and inasmuch as the gardens no longer remain settled or vested in the trustees, on the language of the

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[17] [1913] 1 Ch. 277.

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final provision in the settlement the income goes over to the trustees of the Prestatyn settlement for whom the appellant appears, and, accordingly, they now, in my opinion, are entitled to this income, and the appeal should be allowed.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Field, Roscoe & Co.; Farrer & Co.*

E. D.

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Apr. 14, 15.

Harman J.

In re GESTETNER SETTLEMENT.
BARNETT AND OTHERS *v.* BLUMKA AND OTHERS.

[1952 G. 2869.]

Considered. INLAND REV. COMMRS. v. BROADWAY COTTAGES TRUST [1955] 1 Ch. 20

Applied. *In re* COATES, DECD. [1954] 3 W.L.R. 959

Applied. INLAND REV. COMMRS. v. BROADWAY COTTAGES TRUST [1954] 1 W.L.R. 659

Settlement—Trust to hold capital of fund on trust for such member or members of specified class as trustees may appoint—Specified class fluctuating and so not ascertainable at any given time—No duty on trustees to appoint but only to appoint if they think proper—Validity of trust.

A settlement included a trust to hold the capital of the trust fund on trust for such member or members of a specified class as the trustees might appoint. The specified class comprised four named persons, any person living or thereafter to be born who was a descendant of the settlor's father or uncle, any spouse widow or widower of any such person, five charitable bodies, any former employee of the settlor or his wife or any widow or widower of such employee, any director or employee or former director or employee or spouse widow or widower of a former director or employee of a named company or any company of which the directors included any director of the named company, but so as to exclude the settlor, any wife of the settlor, and any person who was a trustee of the settlement.

The trustees took out a summons to determine, inter alia, whether the beneficial trusts of the settled fund were valid and effective:—

Held, deciding that they were valid, (1) that, where a power does not impose a trust on the donee's conscience, it is not necessary to know all the objects to appoint to one of them, and that a power may be good although in favour of an indefinite class.

In re Park [1932] 1 Ch. 580 and *In re Jones* [1945] Ch. 105, 61 T.L.R. 120 considered.

(2) That where a trustee has a duty to select from a number of recipients of bounty there must be certainty among those recipients.

In re Ogden [1933] Ch. 678; 49 T.L.R. 341 applied.

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(3) That as, in the present case, there was no duty on the trustees to distribute, but there was a duty on them to consider at all times during the subsistence of the trust whether or no they were to distribute any and if so what part of the fund, and if so to whom, there was no authority binding on the court to say that the whole trust was bad or the whole power bad; and, accordingly, that the trust was valid.

Criticism in Farwell on Powers, 3rd ed. (1916), at pp. 168, 169, of the statement by Fry J. in *Blight* v. *Hartnoll* (1881) 19 Ch.D. 294, at p. 301, that " . . . where a power of appointment amongst " a class of people is given, the appointor must . . . be able to " ascertain the class amongst whom he or she is so to divide the " property " approved, on the ground that the statement was too broad.

ADJOURNED SUMMONS.

By a settlement dated April 4, 1951, and made between the third defendant (hereinafter called " the settlor ") of the one part and the plaintiffs (hereinafter called " the trustees ") of the other part, after reciting that the settlor desired to make provision for the members of the specified class thereinafter defined and had for that purpose paid £100,000 to the trustees, it was provided, inter alia, as follows:

By clause 3 the trustees were to hold the trust fund (i.e., the said sum of £100,000 and the investments and property from time to time representing it) on the following trusts:

(a) During the period (hereinafter called the " initial period ") from the date of the settlement until the expiration of five years or such longer time as was therein mentioned or until the prior death of the settlor to hold so much of the income of the trust fund (or of the part thereof not appointed under para. (*b*) of clause 3) as the trustees might think fit on discretionary trusts for the members of the specified class and to accumulate the balance;

(b) to hold the capital of the trust fund for such member or members of the specified class as the trustees might appoint, but so that every such appointment should be made and every interest limited thereunder vest within the period (hereinafter called " the perpetuity period ") therein mentioned;

(c) the trustees were empowered to settle for the benefit of any member or members of the specified class any part of the trust fund appointed under clause 3 (*b*), but so that all interests limited by such settlement should vest within the perpetuity period;

(d) subject as aforesaid on trust for such of the settlor's children then living or thereafter to be born as attained the age of 21 years or died under that age leaving issue him or her surviving, if more than one in equal shares, and in default of any such child then on trust for the defendant the J. N. F. Charitable Trust.

By clause 4 trusts were declared of the unappointed part for the time being of the trust fund after the initial period. Those trusts were:

(a) To apply the same for such member or members of the specified class as the trustees might from time to time determine and so that (i) any such determination should be made before or within two years after the receipt of the income to which it related, and (ii) every such determination should be made and every interest thereunder vest within the perpetuity period;

(b) subject to and in default of such determination in trust for the settlor's children and remoter issue in equal shares per stirpes and in default of such children or issue in trust for the J. N. F. Charitable Trust.

By clause 5 the specified class was defined so as to consist of

(i) Four named individuals, one of whom was the first defendant;

(ii) any person living or thereafter to be born who was a descendant of the settlor's father David Gestetner or of his uncle Jacob Gestetner;

(iii) any spouse, widow or widower of any such person as aforesaid;

(iv) five charitable bodies including the J. N. F. Charitable Trust;

(v) any person who was for the time being a former employee of the settlor or of his wife but was no longer in such employment or was for the time being the widow or widower of a former employee of the settlor or of his wife;

(vi) any person who was for the time being a director or employee or former director or employee or the wife or husband or the widow or widower of a former director or employee of Gestetner Ld. or of any company of which the directors for the time being included any one or more of the persons who were for the time being directors of Gestetner Ld.;

but so as to exclude the settlor, any woman whom he had or should have married and any person who was one of the trustees.

By clause 7 the trustees were empowered to exclude any person from membership of the specified class, but not so as to deprive him of rights already acquired under an irrevocable appointment.

By clause 21 the settlement was expressly declared to be irrevocable.

The settlor's only children were the three infant defendants to this summons, at the date of which none of them had married.

The J. N. F. Charitable Trust was a company registered on July 21, 1939, under section 18 of the Companies Act, 1929.

In September, 1951, the trustees, in exercise of their powers under the settlement, determined in writing to pay out of the income of the trust fund and in fact paid £262 10s. 0d. to the Weizmann Institute Foundation—one of the charitable bodies included in the specified class. That body claimed, as a charity, repayment of the income tax deducted at source from the payment of £262 10s. 0d., but the Chief Inspector of Taxes (Claims) refused that repayment, contending that the trusts declared by the settlement, or some of them, were void, on the ground that membership of the specified class was so wide as to make the trusts of the settlement uncertain and to cause a resulting trust of the trust fund in favour of the settlor. In the circumstances the trustees submitted to the court the question whether the settlement was valid or whether all or any of its provisions were void and, if so, what was the result with regard to the income and capital of the trust fund.

Accordingly, by this summons, which was taken out on October 22, 1952, and to which the defendants were one of the four named individuals who were included in the specified class, the chief accountant of Gestetner Ld., the settlor, his three children, the J. N. F. Charitable Trust and the Inland Revenue Commissioners, the trustees asked, inter alia: whether the beneficial trusts by the settlement declared concerning the capital and income of the settled property were valid and effective or were wholly void for uncertainty or otherwise.

J. A. Wolfe for the plaintiffs.

Charles Russell Q.C. and *R. R. A. Walker* for the member of the specified class and the chief accountant of Gestetner Ld. By clause 3 (*a*) of the settlement the trustees have a discretion during the initial period to distribute income to members of the specified class and, so far as it is not distributed, they are bound to accumulate it. During the second period (from the end of

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the initial period to the end of the perpetuity period) they have a power to determine on the distribution of the income among members of the specified class, and, so far as it is not distributed, the income is to be held in trust for the settlor's issue stirpitally. During the second period the income is distributable among one or more of the specified class, and during the perpetuity period the trustees have a power to " hand out " capital. Finally, by clause 3 (*d*), the whole of the capital is given in equal shares to such of the settlor's children as attain 21 or die under that age leaving issue and, in default thereof, to the J. N. F. Charitable Trust. Thus, all that has been done is that power has been given to the trustees to say that any member of the class shall have income or capital during the periods specified. There is no uncertainty as to the qualification of the class, who are legally ascertainable. There can, therefore, be no vice in these powers, i.e., as to the persons whom the trustees may select and as to the quantity. Apart from selection, the class, as a whole, has not the right to say " we are entitled because of the gift over." The trustees could justify any selection which they might make by saying that the person selected was, e.g., an employee or an ex-employee or the wife of an employee. For a class to be " uncertain " there must be no certainty as to who belongs to it. Here, there is certainty and, accordingly, the court is asked to hold that the trusts are valid and effective.

Sir Andrew Clark Q.C. and *E. I. Goulding* for the settlor. The settlor does not wish that there should be a resulting trust of the trust fund in favour of himself. He wishes the settlement to stand.

Raymond Jennings Q.C. and *Michael J. Albery* for the settlor's children and the J. N. F. Charitable Trust. The whole problem is to make clear what is the duty of trustees of a settlement of this kind in exercising their powers. One of the earliest authorities is *Blight* v. *Hartnoll*,[1] in which a testatrix directed that property be sold at a period beyond the limit prescribed by the rule against perpetuities and the proceeds divided between such of her grandchildren living at the time of the sale in such proportions as the testatrix's sister should by will appoint. Fry J. held the power of appointment to be bad, first, because it offended, in the event, against the rule against perpetuities, and secondly, because, as he stated, the donee " exercised a power of appoint- " ment amongst a class of persons who were not ascertained at the

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[1] (1881) 19 Ch.D. 294, 301.

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"time she exercised it. The class were to be the grandchildren "living at the satisfaction of the mortgages and the annuities. "Neither mortgages nor annuities had been satisfied when she "made the appointment, and she did not therefore know between "whom she was to appoint. I think that where a power of "appointment amongst a class of people is given, the appointor "must know the class—must be able to ascertain the class "amongst whom he or she is so to divide the property. It is "a discretionary power to be exercised with reference to the "respective circumstances and merits of the persons who are to "take, and that cannot be exercised where the persons are not "known." In Farwell on Powers, 3rd ed. (1916), at pp. 168, 169, that statement is criticized as being too wide: "If it were "correct," the criticism continues, "no one could appoint under "the ordinary power of appointment amongst issue, until all "possible issue had been ascertained: and it has never before "been suggested that an appointment to a child under the usual "power to appoint among children or issue is bad, because other "children or issue may be afterwards born." What that criticism amounts to is that, if Fry J.'s statement is sound, there can never be any appointment at all, to any object, because the appointor cannot tell who the future objects will be.

In *In re Mills* [2] the authorities to date are reviewed and the proper way of dealing with powers of this kind is shown. In that case the relevant facts were that the trust fund and all statutory accumulations of income were to be held upon such trusts for the benefit of all or any of the children and remoter issue of the testator's father who, in the opinion of the testator's brother, one of the trustees of the will, should evidence an ability and desire to maintain the family fortune by replacing the sums of which it had been depleted by death duties and other taxation, as the testator's brother should by any deed revocable or irrevocable appoint, and in default of such appointment in trust for such brother absolutely. It was held, reversing the decision of Eve J., that the power was a power appendant or appurtenant to, and not a power coupled with, a trust or a duty in the nature of a trust and, accordingly, that it could be validly released by the donee, who, of course, by releasing the power, became entitled himself: see *per* Lord Hanworth M.R. and P. O. Lawrence L.J. Eve J. seems to have relied on *Weller* v. *Ker*,[3] *In re Eyre* [4] and

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[2] [1930] 1 Ch. 654.

[3] (1866) L.R. 1 Sc. & D. 11.

[4] (1883) 49 L.T. 259.

Saul v. *Pattinson* [5] as being cases of a power coupled with a trust. P. O. Lawrence L.J., however, distinguished them from the case before the court: see also *per* Romer L.J.

In *In re Park* [6] Clauson J. held that a power to a donee to appoint the income of a fund to " any person (other than herself) " or persons or charitable institution or institutions " was valid. At the beginning of his judgment he said: " On the true con- " struction of this clause it seems to me to be an absolute gift " to the stress fund of the Imperial Merchant Service Guild, with " the proviso that during her life Jane Armstrong may by writing, " to such extent as she thinks proper, divert any part of the " income to any object other than her own personal use. Now " Jane Armstrong is not a trustee. If she refused to act in the " matter the court could not appoint another person to act in " her place." The importance of that observation is that he is emphasizing the power as a bare power, not as one coupled with a duty. He continued a little later: " A testator must define for " himself the trusts which he creates: he must not leave it to " his trustees to define them: he cannot leave it to his trustees " to make a will for him, and that is, I conceive, what Lord " Haldane means when he says, in *Attorney-General* v. *National* " *Provincial Bank*, [7] that a testator cannot leave it to someone " else to make a will for him. But here the testator has, as I " have said above, marked out the trust quite definitely and left " nothing indefinite about the trustees' duties." Clauson J. is there construing what Lord Haldane said as meaning that a testator cannot leave it to his trustees to make his will.

The decision in *In re Park* [8] that the power to the donee to appoint to anyone other than herself was good is, however, criticized in Halsbury's Laws of England, 2nd ed., vol. 25, p. 511, in note (*b*) to para. 926, and reference is made to the opinion of Lord Haldane in *Houston* v. *Burns* [9] and to the judgment of Sargant J. in *In re Hughes*, [10] which latter case, however, goes, not on the principle that a testator cannot just leave it to his trustees to make a will for him, but on the rather different principle that he must make a will for himself, that he cannot, so to speak, delegate the making of it. *In re Park* [11] is a very different case from that, because Clauson J. makes it clear at the outset that the provision is that Jane Armstrong "may," not "must" divert any part of the income, and that she is not a trustee.

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[5] (1886) 55 L.J.Ch. 831; 34 W.R. 561.

[6] [1932] 1 Ch. 580, 582, 583.

[7] [1924] A.C. 262, 268; 40 T.L.R. 191.

[8] [1932] 1 Ch. 580.

[9] [1918] A.C. 337, 342; 34 T.L.R. 219.

[10] [1921] 2 Ch. 208, 212.

[11] [1932] 1 Ch. 580.

In *In re Ogden*[12] a testator bequeathed 4 per cent. of his residuary estate "to the Right Honourable Sir Herbert Samuel "to be by him distributed amongst such political federations or "associations or bodies in the United Kingdom having as their "objects or one of their objects the promotion of Liberal principles "in politics as he shall in his absolute discretion select, and in "such shares and proportions as he shall in the like discretion "think fit." There, where Tomlin J. held that the gift was not void for uncertainty, the case proceeded wholly on the footing that it was valid because the objects could all be ascertained. That was the ratio decidendi. Tomlin J. said[13]: "The question "is one of degree in each case, whether, having regard to the "language of the will, and the circumstances of the case, there "is such uncertainty as to justify the court in coming to the "conclusion that the gift is bad. Now, it is to be observed that "in the present case the field of selection is: 'Political federa- "'tions or associations or bodies in the United Kingdom, having "'as their objects or one of their objects the promotion of Liberal "'principles.' I have the evidence of Sir Herbert Samuel, who "has referred to a number of bodies which come within the "description, and who states that, in fact, he can ascertain by "inquiry all the bodies that can come within that description, "and I take the view that upon that evidence, and the language "of the will, and having regard to the principles laid down from "time to time, there is certainty here in the field of selection . . . "and in my view the bequest is not void on the ground that the "field is too vague."

If this is a power coupled with a duty, then *In re Ogden*[14] is very much like the present case. True, there is here a gift over, but that does not prevent the power from being in the nature of a trust or coupled with a duty.

In *In re Nicholson's Settlement*[15] it was held by Farwell J. and the Court of Appeal that when an appointor under a settlement has power to appoint the income of a fund in favour of one object only, and exercises the power, it is necessary, in order to set aside the exercise of the power as a fraud on the power, to prove that there was some bargain, arrangement or understanding between the appointor and the appointee which fettered the appointed interest in the appointee's hands in favour of some person or persons other than himself. Farwell J. held that where, as in the case before him, there was one object only, fraud could not be established unless there was evidence of some such arrangement, and he said that the matter was totally different where the appointor had power to select among a class, in which case it did not matter that the appointee did not know of the improper motive and there was no necessity to prove an arrangement. The Court of Appeal, whose judgment was read by Clauson L.J., affirmed Farwell J.'s judgment and drew attention, as he had done, to the distinction between the power to appoint to one person and the power to appoint to several persons.

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[12] [1933] Ch. 678; 49 T.L.R. 341.

[13] [1933] Ch. 678, 682–3.

[14] [1933] Ch. 678.

[15] [1939] Ch. 11.

In *In re Jones* [16] Vaisey J., following *In re Park* [17] and *In re Byron's Settlement*,[18] held that where a testatrix by her will gave a protected life interest in a trust fund to her son and directed that after his death the fund should be held in trust "for such "person or persons living at the death of my said son . . . as my "said son shall by will or codicil appoint," the power was a valid "power exercisable by the son.

Lastly, in *In re Astor's Settlement Trusts*,[19] Roxburgh J. held that certain trusts created by a settlement were invalid because they were not for the benefit of individuals but were for a number of non-charitable purposes which no one could enforce, and that, for that purpose, there was no distinction between a settlement and a will and, secondly, because they included objects which were void for uncertainty.

That is the extent of helpful authority which it has been possible to discover. It is surprising that there is no authority, in cases or in textbooks, on what is the duty of trustees who have a discretionary power of the kind which the court is now considering. On the other hand, it would also be extraordinary if trustees, having a power of selection of this kind, should be able to select one or two persons without any particular reason. The power of selection here is a power coupled with a duty. The authorities above reviewed show, as far as they go, that where—as here—the trustees cannot know who all the objects are, they cannot have before them the material on which adequately to consider to whom they shall appoint. Accordingly, the power is bad and the whole of the capital is held in trust for the children.

J. H. Stamp for the Inland Revenue Commissioners. It is important to the Commissioners, for the purpose of deciding whether interests of this nature are subject to tax or not, to know what the law is in cases of this kind. Whether trustees have a duty or not is reasonably plain. If they can "sit still and do "nothing" the whole purpose of the trust is defeated. A trust is a duty imposed on the legal owner of property to use it for the benefit of others. Those others have rights. In the present case, if the trustees made it known that they were not going to take these powers into account at all, any member of a class—if it were a good class, i.e., good in law—could come to the court to make the trustees do their duty. The fact that they need not distribute is irrelevant. It is their duty to consider whether they are going to distribute or not. In *In re Park*[20] the court need not have held that the power was well created as far as the trustees were concerned. It was well created only because it could be exercised. If it would otherwise have been bad in that case, it is equally bad in the present case. Clauson J.'s view in *In re Park*[20] covers the present case. The power of selection would have been bad there, because the class was not defined; nor is it defined here; therefore the power of selection here is bad.

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[16] [1945] Ch. 105; 61 T.L.R. 120.

[17] [1932] 1 Ch. 580.

[18] [1891] 3 Ch. 474.

[19] [1952] Ch. 534; [1952] 1 T.L.R. 1003.

There must be certainty in the field of selection or Tomlin J. would not have decided *In re Ogden*[21] as he did. It would be quite contrary to the principles of trust law to allow a vague trust of this kind to be valid. The trust in the present case is not well constituted because its terms are not sufficiently defined.

Charles Russell Q.C. in reply on the cases. In *In re Ogden*[21] there was plainly a duty on Sir Herbert Samuel to distribute the money among federations or associations or bodies as therein mentioned. There was not there, as there is in the present case. a provision that in default of appointment the money should go to A, B or C. Cases like *In re Park*[22] and *In re Jones*[23] touch on the very point that a power may be good notwithstanding that the class in whose favour it is exercisable is indefinite. It is important to appreciate that point in approaching the cases which have been cited; and important, particularly, to give full weight to the criticism in Farwell on Powers of Fry J.'s decision in *Blight* v. *Hartnoll.*[24]

HARMAN J. This is a point, raised, in effect, by the Inland Revenue Commissioners, arising out of a voluntary settlement made by one Sigmund Gestetner, a man of great wealth, who settled a fund by an instrument of April 4, 1951, by conveying it to trustees on trusts primarily for persons connected with his family business. Nobody interested under the settlement wishes to upset it, as I understand the matter; but the point has arisen because the Inland Revenue Commissioners, when asked by a charity, to whom money had been paid by the trustees in exercise of their discretion, to refund the income tax which the trustees had borne, declined to do so on the ground that the trusts were void, so that the money was the settlor's own by way of resulting trust; and was accordingly the money of an individual given away to a charity not under a covenant, and so did not give any right to the charity to recover the tax paid.

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[20] [1932] 1 Ch. 580.

[21] [1933] Ch. 678.

[22] [1932] 1 Ch. 580.

[23] [1945] Ch. 105.

[24] 19 Ch.D. 294.

The trustees, faced with that decision, were, of course, in an awkward position. The settlor had no desire, as he has said here in court by his counsel, to resile in any way from the act of bounty which he had performed; but for the trustees the position was not at all easy, because their consideration of the suitability or otherwise of any distribution they should make might, of course, be very much affected by income tax questions. Apart from that, there are infants interested in remainder under the settlement and, in theory at any rate, they could, if so minded (and they might be bound to) accuse the trustees of a breach of trust if in fact the discretion which they were exercising was void. So the trustees have taken out this summons and have asked a number of questions, of which the first argued before me so far is the fundamental one, namely, whether the trusts are good or whether they are touched by the vice of uncertainty and therefore invalid.

The frame of the deed is a curious one. The first recital is that "the settlor is desirous of making provision for the members "of the specified class as hereinafter defined in manner herein-"after appearing." When one looks, therefore, at the definition of "specified class," one finds it—in clause 5—as a number of living persons, the descendants of the settlor's father, the descendants of the settlor's uncle, any widow or widower of those named persons, a number of charitable institutions, any person who is an ex-employee of the settlor or his wife or the widow or widower of a former employee, and finally any person who is for the time being a director or employee or former director or employee or the wife or husband or the widow or widower of a former director or employee of Gestetner Ld. or of any company of which the directors for the time being include any one or more of the directors of Gestetner Ld. Then certain persons are excluded, the settlor and his wife and the trustees, for income tax purposes.

That is a class which, it is admitted, is not one ascertainable at any given time, being a fluctuating body. Any of the six directors of Gestetner Ld., for instance, may take on tomorrow a new directorship which brings in a new stream of possible objects of the trustees' bounty; but, apart from that, it is admitted that it is impossible to know at any one moment the names of all the members of the specified class. The specified class includes, as I save said, descendants of the settlor's father and uncle. It will be found that some of those persons are the people to take the fund if the trustees do not distribute it among other members of the class or those members themselves. In other words, the class to take in default of appointment is a part of the objects of the power.

The settlement, having recited, as I have mentioned, and described the fund as being £100,000, sets up the trusts which begin by clause 3 (a), whereby during a period of five years or longer or shorter, according to certain events which I need not particularize, or until the settlor's death—that is to say, a very limited period—the trustees are to pay, divide or apply so much of the income of the trust fund as they shall think fit to or between or for the maintenance, support or benefit of all or any one or more of the members of the specified class as the trustees shall in their absolute discretion (without being liable to account) think fit and shall accumulate the balance at compound interest and hold the accumulations as an accretion to the capital, with liberty to resort to past accumulations. So far, there is obviously no duty at all to distribute any more than the trustees think fit. That is a perfectly ordinary power.

The rest of that clause goes on to deal with the capital, but logically, I think, one must deal with the income first. The income after the initial period is dealt with by clause 4 (a), whereby the trustees shall hold such income on trust to pay or apply it for the maintenance or benefit of such member of the specified class as the trustees determine. There, on the face of it, is a trust to apply the whole of the income. It does not say "such "part as they think fit." Then there are various detailed provisions of an administrative sort which I do not think matter. The second part of the clause goes on in these terms: "Subject to "and in default of such determination as is hereinbefore provided "by subclause (a) the trustees shall hold the income or the "undisposed portion thereof in trust to pay the income for the "maintenance or benefit of such of the children and remoter "issue of the settlor as are for the time being in existence and "if more than one in equal shares per stirpes" with remainder over. In other words, if money be not distributed, it is to go to children who would be objects of the power of distribution but are not, of course, by any means all the objects. That is the income trust; and it is to continue for a period limited by reference to the rule against perpetuities. In the meanwhile, without prejudice (so to speak) to this arrangement regarding income, the trustees are to hold the capital for such members of the specified class and in such shares and proportions as they may in writing appoint, and they may settle portions of the capital if they are minded so to do. Finally, it is provided: "Subject to any and every exercise of any power hereby or by "law given to the trustees the trustees shall stand possessed of "the trust fund upon trust for such of the children of the settlor ". . . as attain the age of 21 years" and so forth—again a limited number of persons who are also objects of both the discretionary powers.

It was said on behalf of the Crown and said also by Mr. Jennings (as he was bound to do, representing infants interested in default of appointment) that the power of selection given to these trustees, being a power coupled with a duty, is bad because it is, as it admittedly is, impossible to know the limits of the area of selection; that is to say, though the trustees can at any moment tell whether John Doe or Richard Roe is a person within the power, they cannot tell how many more people there may be within it; and it was said that a power of this sort, if it be not limited to known objects, is bad because the trustee cannot perform his duty of considering the merits and demerits of the objects unless he knows who they are. That may turn, so it seems to me, on the question whether this is truly a power coupled with a duty, a phrase which I think is a phrase of art. If a power be a power collateral, or a power appurtenant, or any of those powers which do not impose a trust upon the conscience of the donee, then I do not think that it can be the law that it is necessary to know of all the objects in order to appoint to one of them. If that were so, many appointments which are made every day would be bad. It must often be uncertain whether there will be further objects coming into existence. It may often be uncertain what objects are in existence; but, in an ordinary family settlement, the fact that a father did not know whether one of his sons had married and had children or no could not possibly invalidate the exercise by him of a power of appointment in favour of those grandchildren of whom he did know. On the other hand, if it is the trustee's duty to distribute the fund among a number of people, his task being to select which of those people shall be the objects of his bounty, then it seems to me there is much to be said for the view that he must be able to review the whole field in order to exercise his judgment properly.

There appears to be very little authority on this point. It seems to be law, at any rate in this court, that a power may be a general power (which has often been called the equivalent of property because the donee can exercise it in his own favour), or it can be a special power, namely, a power to benefit a known and defined class of persons, or it can be something betwixt and between. In *In re Park*,[1] before Clauson J., there was a power to appoint to anybody other than the donee herself, and Clauson J. held that good. In *In re Jones*,[2] before Vaisey J. in 1945, there was a power to appoint to anybody being a person and not a corporation (as Vaisey J. held) living at the death of the donee; that is to say, any individual alive at his death. That was not a general power, but it was nevertheless held to be good. It follows, so far as I am concerned at any rate, that a power may be good although it is exercisable in favour of an indefinite class; but Clauson J., careful judge as he was, took care to say at the beginning of his judgment that there was no trust or obligation upon the donee, Jane Armstrong in that case. He begins his judgment by saying[3]: "Now Jane Armstrong is "not a trustee. If she refused to act in the matter the court "could not appoint another person to act in her place"; in other words, she had a power collateral which was absolutely hers to exercise or not as she chose.

The same was true in *In re Jones*.[4] It is, however, to be inferred, I think, from *In re Ogden*[5] that in a case where there is a duty on a trustee to select from a number of persons which of them shall be the recipients of the settlor's bounty, there must be a certainty as to those recipients. In that case, the testator bequeathed a fraction of his residuary estate to H. S. (Sir Herbert

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[1] [1932] 1 Ch. 580.
[2] [1945] Ch. 105; 61 T.L.R. 120.
[3] [1932] 1 Ch. 580, 582.
[4] [1945] Ch. 105.
[5] [1933] Ch. 678.

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Samuel)—I quote from the headnote [6]—" ' to be by him distri-" ' buted amongst such political federations or bodies in the " ' United Kingdom having as their objects or one of their objects " ' the promotion of Liberal principles in politics as he shall in his " ' absolute discretion select and in such shares and proportions " ' as he shall in the like discretion think fit.' H. S. stated that " he was able to ascertain all the bodies in the United Kingdom " that fell within the description of the bequest "; and Lord Tomlin, sitting as a judge of the Chancery Division, held that good; but he so held for the very reason that it was not uncertain because of the evidence that the donee could ascertain all the objects. He said [7]: " . . . All that I " have to consider is, whether there is such uncertainty in the " field of selection that it is impossible for the selector to " determine from which institutions he is to select. If so, the " bequest is bad on the ground of uncertainty. The question is " one of degree in each case, whether, having regard to the " language of the will, and the circumstances of the case, there is " such uncertainty as to justify the court in coming to the con-" clusion that the gift is bad." He then stated what the field was, and continued: " I have the evidence of Sir Herbert " Samuel, who has referred to a number of bodies which come " within the description, and who states that, in fact, he can " ascertain by inquiry all the bodies that can come within that " description, and I take the view that upon that evidence, and " the language of the will, and having regard to the principles " laid down from time to time, there is certainty here in the field " of selection." In other words, that decision turned on the fact that Lord Tomlin accepted Sir Herbert Samuel's evidence that the number of objects was ascertainable; failing that, he would have held the power bad. It was clear that Sir Herbert Samuel had an absolute duty. There was no gift over. This was a share of a residue. He had an absolute duty to distribute it. He merely had the right to say to whom, among a number of persons, he should distribute. If, therefore, all those persons had joined together and had agreed to take in agreed shares, they could have put an end to Sir Herbert's discretion, and come to the court and had the fund distributed between them. That being so, it was in effect a gift to all of them in such proportions as Sir Herbert should select. One can see, therefore, that certainty among the objects was a necessity.

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[6] [1933] Ch. 678.

[7] Ibid. 682.

There is one other authority on this matter, namely, the great authority of Fry J. in *Blight* v. *Hartnoll*,[8] dealing with a power given to one Christiana Hartnoll to appoint among a class of grandchildren living at a certain date. I read from the judgment[9]: "The result is," he said, "that the proceeds of the "property are to be distributed amongst such of the grand-"children as should be living at the time of the sale, in such "proportions as Christiana Hartnoll should by her will appoint." He held that to be bad because it offended, in the event, against the rule against perpetuities; but he also went on to say that there was a second fatal objection to it, and he used these words[10]: "The second objection, which I think is equally fatal, "is this, that Christiana Hartnoll exercised a power of appoint-"ment amongst a class of persons who were not ascertained at "the time she exercised it. The class were to be the grand-"children living at the satisfaction of the mortgages and the "annuities. Neither mortgages nor annuities had been satisfied "when she made the appointment, and she did not therefore "know between whom she was to appoint. I think that where "a power of appointment amongst a class of people is given, the "appointor must know the class—must be able to ascertain the "class amongst whom he or she is so to divide the property. It "is a discretionary power to be exercised with reference to the "respective circumstances and merits of the persons who are to "take, and that cannot be exercised where the persons are not "known." That statement has been criticized by Sir George Farwell in his book on Powers, and the criticism is endorsed by his son, Sir Christopher Farwell, the editor of the third edition of that work, at pp. 168, 169; and it does seem to me that Fry J. stated the matter too widely. If the power be a power not involving any duty on the donee, he may appoint or not as he chooses. He may release the power or appoint to one object without knowing whether or not there is another; but it is different where there is a duty, and the question therefore is whether here there is a duty and, if so, what it is.

It was suggested that one of the criteria was whether this power could be released. I doubt whether I get much help from that. It seems to me that any power given to trustees for the time being of an instrument cannot be released by the trustees at any given moment of that instrument.

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[8] 19 Ch.D. 294.

[9] Ibid. 300.

[10] Ibid. 301.

Apart from that, there is in this case an express power in the trustees to exclude members from the specified class, but so that the specified class be not reduced to none; in other words, they are not entitled entirely to release the power. That means that they are bound, as I see it, to consider at all times during which the trust is to continue whether or no they are to distribute any and if so what part of the fund and, if so, to whom they should distribute it. To that extent, I have no doubt that there is a duty on these trustees: a member of the specified class might, if he could show that the trustees had deliberately refused to consider any question at all as to the want or suitability of any member of the class, procure their removal; but there is not, as in Sir Herbert Samuel's case, *In re Ogden*,[11] any duty, as I see it, on the trustees to distribute the whole of either income or capital among the members of the specified class; and if the whole of those members could join together, they could still, as I understand it, not divide the fund between them; because there is a class in default of appointment, and the document on its face shows that there is no obligation on the trustees to do more than consider—from time to time, I suppose—the merits of such persons of the specified class as are known to them and, if they think fit, to give them something. The settlor had good reason, I have no doubt, to trust the persons whom he appointed trustees; but I cannot see here that there is such a duty as makes it essential for these trustees, before parting with any income or capital, to survey the whole field, and to consider whether A is more deserving of bounty than B. That is a task which was and which must have been known to the settlor to be impossible, having regard to the ramifications of the persons who might become members of this class.

If, therefore, there be no duty to distribute, but only a duty to consider, it does not seem to me that there is any authority binding on me to say that this whole trust is bad. In fact, there is no difficulty, as has been admitted, in ascertaining whether any given postulant is a member of the specified class. Of course, if that could not be ascertained the matter would be quite different, but of John Doe or Richard Roe it can be postulated easily enough whether he is or is not eligible to receive the settlor's bounty. There being no uncertainty in that sense, I am reluctant to introduce a notion of uncertainty in the other sense, by saying that the trustees must worry their heads to survey the

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[11] [1933] Ch. 678.

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world from China to Peru, when there are perfectly good objects of the class in England. Consequently, I am not minded to upset the scheme put forward by the settlor on the ground indicated, namely, that of uncertainty. There is no uncertainty in so far as it is quite certain whether particular individuals are objects of the power. What is not certain is how many objects there are; and it does not seem to me that such an uncertainty will invalidate a trust worded in this way. I accordingly declare the trust valid.

Order accordingly.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Solicitor of Inland Revenue.*

K. R. A. H.

In re CONSOLIDATED GOLDFIELDS OF NEW ZEALAND LD.

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Mar. 2, 3.

Roxburgh J.

[No. 0068 of 1952.]

Company—Winding up—Contributories—"Member"—Whether including past member—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *ss.* 38 (7), 74—*Companies Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 26 (2), 212 (1), (2); 213.

Section 212 (1) of the Companies Act, 1948, provides: "In the "event of a company being wound up, every present and past "member shall be liable to contribute to the assets of the company "to an amount sufficient for payment of its debts and liabilities ". . . and for the adjustment of the rights of the contributories "among themselves, subject to . . . the following qualifications:— ". . . (*g*) a sum due to any member of a company, in his character of "a member, by way of dividends, profits or otherwise shall not be "deemed to be a debt of the company, payable to that member in a "case of competition between himself and any other creditor not a "member of the company, but any such sum may be taken into "account for the purpose of the final adjustment of the rights of "the contributories among themselves."

The liquidator of the company took out a summons, one of the two respondents to which was a past member, and the other an unsecured creditor, of the company. The past member claimed to be a creditor in respect of a sum of £65 due to her by way of unclaimed dividends declared while she was still a member of the company, and by this summons the liquidator asked whether, having regard to section 212, he could treat that sum as a debt of the company ranking for dividend in competition with the unsecured debts

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of the company due to persons otherwise than in their capacity as members or past members of the company:—

Held, that, for the purposes of section 212 (1) (*g*), a "member" included a past member; so that a debt due to a past member in respect of unclaimed dividends could not be admitted to rank in competition with the debts due to ordinary creditors. Section 212 treated "members" as a genus of which there were two species—present and past members.

In re Anglesea Colliery Co. (1866) L.R. 1 Ch. 555 followed.

In re Aidall Ld. [1933] Ch. 323 not followed.

ADJOURNED SUMMONS.

In the voluntary winding up of the company the cash available for payment of creditors was likely to be insufficient to pay in full all the creditors, including those having claims in respect of unclaimed dividends. The liquidator was advised that on the true construction of section 212 of the Companies Act, 1948, present members of the company could not prove in the liquidation in respect of unclaimed dividends in competition with the general body of creditors, but that considerable doubt arose with regard to the rights of persons who had been but were no longer members of the company; and he accordingly took out this summons, to which the respondents were a past member who was owed £65 by the company in respect of unclaimed dividends and a general creditor who was owed £583.

By the summons the liquidator asked whether, having regard to the provisions of section 212, he should treat the sum of £65 due to the past member by way of unclaimed dividends declared while she was a member of the company as a debt of the company ranking for dividend in competition with the unsecured debts of the company due to persons otherwise than in their capacity as members or past members of the company.

J. A. Wolfe for the liquidator. The court is asked to decide whether the word "member" includes past member. The question arises whether the "sum due" in section 212 (1) (*g*) [1]

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[1] Companies Act, 1948, s. 26 (2): "Every other person"—i.e., person other than a subscriber to the memorandum—"who agrees to become a "member of a company, and whose "name is entered in its register of "members, shall be a member of the "company."

S. 212 (1): "In the event of a com- "pany being wound up, every present "and past member shall be liable to "contribute to the assets of the com- "pany to an amount sufficient for "payment of its debts and liabilities ". . . and for the adjustment of the "rights of the contributories among "themselves, subject to . . . the fol- "lowing qualifications:—(*a*) a past "member shall not be liable to contri- "bute if he has ceased to be a member

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includes a sum due to a person who has ceased to be a member for the past 12 years. One of the contentions will be that the word " member " includes past and present members generally and that, in this subsection, it has the particular significance of past member. In the present state of the authorities, however, that is a matter for argument. [*In re New Chile Gold Mining Co.*[2] was referred to.] It will be necessary to consider, besides sections 26 (2), 212 (1), (2) and (3) and 213 of the Companies Act, 1948, section 38 (7) (which is the provision corresponding to section 212 (1) (*g*) of the Act of 1948) and section 74 (which is the provision corresponding to section 213 of the Act of 1948) of the Companies Act, 1862.[3]

" for one year or upwards before the commencement of the winding up; (*b*) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member; (*c*) a past member shall not be liable to contribute unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act; (*d*) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member; (*e*) in the case of a company limited by guarantee, no contribution shall, subject to the provisions of subsection (3) of this section, be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up; (*f*) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted . . . (*g*) a sum due to any member of a company, in his character of a member, by way of dividends, profits or otherwise shall not be deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves."

(2) " In the winding up of a limited company, any director or manager, whether past or present, whose liability is, under the provisions of this Act, unlimited, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company: . . ."

(3) " In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him."

S. 213: " The term ' contributory ' means every person liable to contribute to the assets of a company in the event of its being wound up. . . ."

[2] (1890) 45 Ch.D. 598; 6 T.L.R. 462.

[3] Companies Act, 1862, s. 38: " In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company,

L. H. L. Cohen for the past member. In section 212 (1) (*g*) the words " any member " in the expression " a sum due to any " member " mean anyone who is a member at the time of the winding up. Note 9 to section 212 (1) (*g*) in Buckley on the Companies Acts (12th ed. (1949), at p. 426) gives a series of authorities on the meaning of the words " in his character of a " member," but it would appear that, at any rate for the purposes of the present case, not much assistance is to be derived from any of them. Here the sum became due to the past member concerned in her " character of a member," and the case is one in which the relationship between the company and her is the ordinary one of debtor and creditor. " Member " means " present member " throughout the Act except in this section, in which the words " past member " are used as a phrase: cf. section 26 (2) and section 212 (1) (*e*). That paragraph ties up with section 212 (3), in which " member " must mean " present " member," because " any shares held by him " means shares held by him at the date of the winding up. True, in *In re Anglesea Colliery Co.*,[4] Turner L.J. said that throughout the Act of 1862 the words " members " and " contributories " were used interchangeably, and said also that he was referring to section 38 (7)—which is the provision corresponding to section 212 (1) (*g*) of the Act of 1948. Earlier he had said that " all the members " must be considered to be contributories," so that, on the authority of that case, it would appear that in section 212 (1) (*g*) " member " must include " past member," with the result, in the present case, that the £65 due to the past member concerned cannot be admitted to rank in competition with debts due to ordinary creditors. In *In re Aidall Ld.*,[5] however, Maugham J. held that, in sections 123 to 128 of the Companies Act, 1908—which, it is to be observed, were the sections corresponding to

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" and the costs, charges, and expenses " of the winding-up, and for the " payment of such sums as may be " required for the adjustment of the " rights of the contributories amongst " themselves, with the qualifications " following; (that is to say,) . . . (7) " No sum due to any member of a " company, in his character of a member, by way of dividends, profits, " or otherwise, shall be deemed to be " a debt of the company, payable to " such member in a case of competition between himself and any other " creditor not being a member of the " company; but any such sum may be " taken into account, for the purposes " of the final adjustment of the rights " of the contributories amongst themselves."

S. 74: " The term ' contributory ' " shall mean every person liable to " contribute to the assets of a company under this Act, in the event " of the same being wound up. . . ."

[4] (1866) L.R. 1 Ch. 555, 558, 559, 560.

[5] [1933] Ch. 323.

sections 212 and 213 of the Act of 1948—" contributories " meant only the holders of partly paid shares. That is diametrically opposed to the decision of the Court of Appeal in *In re Anglesea Colliery Co.*,[6] which is not mentioned in the report of the case and so, apparently, was not cited to Maugham J. or to the Court of Appeal, which upheld him. As, however, the Court of Appeal did uphold him, this court is now asked to follow *In re Aidall Ld.*,[7] which is by far the more recent decision, and to hold that, in the present case, the liquidator can treat the £65 as a debt of the company ranking for dividend in competition with its unsecured debts due to persons otherwise than in their capacity as members or past members.

G. T. Hesketh for the unsecured creditor. The unsecured creditor asks the court not so to hold. The reference in section 212 (1) (*f*) to " individual members " is sufficient to show that the word " members " is not limited to existing members; and in paras. (*d*) and (*e*) the phrase " any member " is to be construed as including past members. In *In re New Chile Gold Mining Co.*[8] Stirling J. took the view that the question whether a past member was to be treated as a member for the purposes of section 38 (7) of the Act of 1862 was " one of very considerable " difficulty." He did not give a concluded opinion on the meaning of the provision, but he did express the view that it was difficult to see how the sum which was sought to be proved could be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves " where the person who " claims is not a past member liable to be made a contributory " of the company." *In re Aidall Ld.*[9] ought not to be followed in preference to *In re Anglesea Colliery Co.*[10] Quite clearly the earlier case was not cited to Maugham J. for, had it been, he must perforce have followed it. Accordingly, this court should follow *In re Anglesea Colliery Co.*[10] [Reference was also made to *In re National Savings Bank Association*[11]; *In re Osmondthorpe Hall Freehold Garden and Building Allotment Society*[12]; *In re Hodges' Distillery Co., Ex parte Maude*[13]; *In re British and Foreign Cork Co., Leifchild's Case*[14]; *In re General Estates Co., Hastie's Case*[15]; and *In re Marlborough Club Co.*[16]]

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[6] L.R. 1 Ch. 555.

[7] [1933] Ch. 323.

[8] 45 Ch.D. 598; 6 T.L.R. 462.

[9] [1933] Ch. 323.

[10] L.R. 1 Ch. 555.

[11] (1866) L.R. 1 Ch. 547.

[12] [1913] W.N. 243.

[13] (1870) L.R. 6 Ch. 51.

[14] (1865) L.R. 1 Eq. 231.

[15] (1868) L.R. 7 Eq. 3.

[16] (1868) L.R. 5 Eq. 365.

Roxburgh J. [after stating the facts:] It is remarkable that this question should still be enveloped in fog, having regard to the many revisions which have been made of the Companies Acts and the many decisions which have been given on the construction of those Acts; but, of course, it is not often that the amount of unpaid dividends is large in proportion to the sums involved in the liquidation, and that, no doubt, is the reason why the question is in this state of uncertainty.

[His Lordship then read section 212 (1) (*g*) of the Companies Act, 1948, and continued:] That provision, without any material variations, has stood since the Companies Act, 1862.

At first blush, I should have said that "member" means what it says. There is no doubt what constitutes membership of a company. Section 26 (2) makes that clear. It provides: "Every other person [i.e., apart from subscribers to the memo-"randum] who agrees to become a member of a company, and "whose name is entered in its register of members, shall be a "member of the company."

Therefore, I should have said without hesitation that the word "member" did not include so-called past members who, in fact, are not members at all, but persons who, having been members, have ceased to be such. But it is never safe to construe an Act of Parliament by paying undue attention to the meaning of words. Standing by itself there really could be, I think, no doubt about it; but the matter has a long history, and curiously enough, one of the most important chapters in the history, which relates to a decision of the Court of Appeal, seems for many years to have escaped notice. This, I think, accounts to some extent for the uncertainty which exists today.

Before I explain that, I must read another section of the present Act, namely, section 213, which provides: "The term "'contributory' means every person liable to contribute to the "assets of a company in the event of its being wound up. . . ." Again, on reading that section, I should immediately have said that it does not include people who are not liable to contribute to the assets of the company in the event of its being wound up; and it will appear shortly that Maugham J. must have been of that opinion, because he observed, in a later case to which I will refer, that it did not include fully-paid shareholders. But it seems to me that, unfortunately, the Court of Appeal long ago decided that that section does not mean what it appears to say, and does include fully-paid shareholders. Indeed, it seems to me, on close inspection, that this apparently forgotten decision of the Court of Appeal really covers the point which I have to decide, and that is why I am not reserving my judgment. It is *In re Anglesea Colliery Co.*[1] The headnote reads: "A holder of "fully paid-up shares in a limited liability company is a 'con- "'tributory' within the meaning of the Companies Act, 1862."

To explain the judgment, I must, first, read section 74 of the Companies Act, 1862, which provided: "The term 'con- "'tributory' shall mean every person liable to contribute to the "assets of a company under this Act, in the event of the same "being wound up. . . ." It is plain, therefore, that there is no material difference between that section and section 213 of the present Act.

I must now read section 38 (7) of the Companies Act, 1862. It provided: "No sum due to any member of a company, in his "character of a member, by way of dividends, profits, or other- "wise, shall be deemed to be a debt of the company, payable to "such member in a case of competition between himself and any "other creditor not being a member of the company; but any "such sum may be taken into account, for the purposes of the "final adjustment of the rights of the contributories amongst "themselves."

It will, I think, be seen that again there is no material difference between that subsection and section 212 (1) (*g*) of the Companies Act, 1948. In *In re Anglesea Colliery Co.*, Sir George Turner L.J., delivering the first judgment in the Court of Appeal, said[2]: "The substantial question raised by this appeal is, "whether the holders of the paid-up shares in companies to "which the Act of 1862 applies, fall within the description of "contributories contained in that Act." Subsequently he continued: "This question depends, as it seems to me, peculiarly "upon the 74th and 38th sections of the Act." Then his Lordship read the 74th section, which I have just read, and said: "This section, therefore, in no way defines the persons on whom "the liability created by it is to attach; but it refers to a liability "under the Act, and leaves it to be collected from other parts "of the Act on whom the liability was intended to be fixed. "Upon examining the other parts of the Act, there is nothing, "that I can find, which at all describes the persons who are to be "liable, except what is contained in the 38th section, and it is, "therefore, to the description contained in that section that the "74th section must, as I think, be taken to refer."

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[1] L.R. 1 Ch. 555.

[2] Ibid. 558.

His Lordship then read the 38th section, and perhaps I ought to read some of it to explain it. It began with the words: "In "the event of a company formed under this Act being wound up, "every present and past member of such company shall be liable "to contribute to the assets of the company to an amount "sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, "and for the payment of such sums as may be required for the "adjustment of the rights of the contributories amongst themselves, with the qualifications following; (that is to say,) . . ."

There is no substantial difference, for present purposes, at any rate, between that opening portion of section 38 of the Act of 1862 and the opening portion of the present section 212.

Then his Lordship said[3]: "Reading this section apart from "the qualifications, there can, as it seems to me, be no doubt "upon whom the liability is fixed. It is clearly fixed upon the "'present and past members' of the company, and the present "and past members of the company must, therefore, be contributories within the meaning of the 74th section. This part of the "38th section is in effect descriptive of the persons to whom "the 74th section refers. The question then must be, what is "the effect of the qualification contained in article 4 of this 38th "section, and, in my opinion, it does not derogate from the "previous description. On the contrary, the qualifying clauses "assume the members to be liable, and merely provide in what "cases, and to what extent, the liability is to be enforced against "them. I think, therefore, that, notwithstanding this qualification, all the members must be considered to be contributories. "Upon these sections alone, therefore, I can hardly doubt that "all members of a company, and there can be no doubt that the "holders of paid-up shares are members, ought to be held to "fall within the description of contributories. . . ."

It appears to me, first, that this passage was part of the ratio decidendi of *In re Anglesea Colliery Co.*[4] It is, therefore, binding on me, and it seems to show quite plainly that what used to be section 74, and is now section 213, does not mean what, upon the face of it, it would appear to mean; but that, on the contrary, all past and present members of the company, without limitation, are contributories within the meaning of section 74 of the Act of 1862 and section 213 of the present Act.

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[3] L.R. 1 Ch. 559.

[4] L.R. 1 Ch. 555.

That being so, while I have been much troubled by *In re Aidall Ld.*,[5] a decision of Maugham J. which was confirmed by the Court of Appeal, I think that I ought to give effect to the long-standing decision of the Court of Appeal in *In re Anglesea Colliery Co.*[6] and not to the ratio decidendi of *In re Aidall Ld.*[7]

It is to be observed—and this I think is quite clear—that the *Anglesea*[8] case was not cited in *In re Aidall.*[9] If it had been cited, Maugham J. would, I think, have been bound by it, unless he were able to distinguish it; but he certainly does not purport to distinguish it, and there is no reason to suppose that he was aware of it. He said[10]: " In the series of sections, sections 123 " to 128, which are headed with the word ' contributories,' "—he was referring to the Act of 1908, of which sections 123 to 128 corresponded to the present sections 212 and 213—" I am of " opinion that the word ' contributories ' is used in the narrow " sense—namely, the holders of partly paid shares."

I think that I am bound to conclude that he said that per incuriam, because, as far as I can see, it is quite irreconcilable with the decision of the Court of Appeal in *In re Anglesea Colliery Co.*[11]

I feel bound to say, with all respect and humility, that I think that, when the Court of Appeal approved of his reasoning, they also were not aware of *In re Anglesea Colliery Co.*,[12] which they did not seek to explain or distinguish, and that they also must have approved Maugham J. per incuriam. I do not think that this is a case in which I ought to adopt the later decision of the Court of Appeal in preference to the earlier decision on the artificial doctrine that what comes last is to be preferred to that which went before. The more probable explanation is that there really was some accidental overlooking of the earlier decision of the Court of Appeal.

I must now read some more of the *Anglesea* case. Sir George Turner L.J. said[13]: " Throughout the Act we find members and " contributories used interchangeably; I refer particularly to " section 38, article 7 "; and he mentioned also certain other articles. There again, article 7 of section 38 is the precise provision which I have to construe in its new setting in the Companies Act, 1948. He seems to me to be saying that in that section

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[5] [1933] Ch. 323.
[6] L.R. 1 Ch. 555.
[7] [1933] Ch. 323.
[8] L.R. 1 Ch. 555.
[9] [1933] Ch. 323.
[10] Ibid. 328.
[11] L.R. 1 Ch. 555.
[12] Ibid.
[13] Ibid. 560.

" members " and " contributories " are used interchangeably. He has already told me that " contributories " includes all members past and present. I think, therefore, that the Court of Appeal have answered the question which I am asked. Sir James Knight Bruce L.J. was of the same opinion as Sir George Turner L.J.

As I say, I should have reserved judgment but for that decision; but it is the view to which I was tending by a quite independent line of approach. I must now read further from section 212 (1). After the words " the following qualifications," the subsection continues: " (*a*) a past member shall not be liable " to contribute if he has ceased to be a member for one year or " upwards before the commencement of the winding up." There there is not the least doubt that " member " is used in its true sense.

" (*b*) a past member shall not be liable to contribute in respect " of any debt or liability of the company contracted after he " ceased to be a member." There again " member " is used in its true sense.

" (*c*) a past member shall not be liable to contribute unless it " appears to the court that the existing members are unable to " satisfy the contributions required to be made by them in " pursuance of this Act."

Why " existing members "? Why not " members "? A past member is not a member at all; he is a person who has ceased to be a member. Here is the genesis of the confusion: the draftsman is clearly thinking of " members " as a category or genus of which there are two species—past members and existing members. The word " existing " would otherwise be quite otiose and quite unnecessary.

Paragraph (*d*) shows plainly that that is the process of the draftsman's mind, because it provides: " in the case of a company limited by shares, no contribution shall be required from " any member exceeding the amount, if any, unpaid on the " shares in respect of which he is liable as a present or past " member."

There the transition is complete, because the word " member " there must mean present or past member. A past member is not a member, and the use of the word " member " can only be explained on the hypothesis that the draftsman is treating membership as a genus of which there are two species, present and past.

When, therefore, I come to (*e*) and I meet the word again—"in the case of a company limited by guarantee, no contribution shall, subject to the provisions of subsection (3) of this "section, be required from any member exceeding the amount "undertaken to be contributed by him to the assets of the company in the event of its being wound up"—am I to say that "member" there is used in the strict sense in which it was used in (*a*) and (*b*), or in the inaccurate sense in which it was used in (*c*) and (*d*)? I have no doubt that the answer is, the inaccurate sense in which it was used in (*c*) and (*d*); because otherwise there seems to me to be a lacuna in the limitation of the liability to contribute which rests on a past member of a company limited by guarantee.

Then comes: "(*f*) nothing in this Act shall invalidate any "provision contained in any policy of insurance or other contract "whereby the liability of individual members on the policy or "contract is restricted. . . ." Considering the word "members" there, how is it used—in the strict sense or the inaccurate sense? Again, though this case is not by any means so clear, the inaccurate sense is, I think, to be preferred as making a more rational arrangement.

Then comes (*g*), which I have read.

Next comes subsection (2), which provides: "In the winding "up of a limited company, any director or manager, whether past "or present, whose liability is, under the provisions of this Act, "unlimited, shall, in addition to his liability (if any) to contribute "as an ordinary member,"—that is a new variant—"be liable "to make a further contribution as if he were at the commencement of the winding up a member of an unlimited "company."

There, does the expression "ordinary member" include past members or is it to be read in its strict sense? There again, it is not possible, as far as I can see, to justify distinguishing between a member and a past member, and I have little doubt that there it is to be read in the unusual sense in which it is to be read in paras. (*c*), (*d*), (*e*) and (*f*).

The last subsection, subsection (3), provides: "In the winding "up of a company limited by guarantee which has a share "capital, every member of the company shall be liable, in addition "to the amount undertaken to be contributed by him to the "assets of the company in the event of its being wound up, to "contribute to the extent of any sums unpaid on any shares held "by him." With regard to that, I propose to say nothing. I think that that provision is more difficult and anything that I might say would be obiter.

Quite apart from authority, I should reach the conclusion that, though the primary meaning of the word "member" is clearly applicable in paras. (*a*) and (*b*), it is clearly inapplicable in paras. (*c*) and (*d*), and that the unusual meaning is preferred in paras. (*e*) and (*f*) and in subsection (2); it ought also to be preferred in para. (*g*) of subsection (1). Therefore I should have reached the conclusion by that line of reasoning that "member" in para. (*g*) includes in an artificial manner past members. That, as I say, seems to me to be what the Court of Appeal decided in *In re Anglesea Colliery Co.*[14]

I must add a word about *In re New Chile Gold Mining Co.*[15] With regard to the very question which I have to determine, Stirling J., who was considering section 38 (7) of the Companies Act, 1862, said [16]: "First of all, then, I have to consider whether "the applicant is a member of the company within the meaning "of the 7th subsection; and I confess that, having repeatedly "considered the question whether a past member is to be treated "as a member for the purposes of that subsection, it appears "to me to be one of very considerable difficulty. I do not, "however, think it is necessary on the present occasion to express "a concluded opinion as to the meaning of that subsection; but, "having regard to the last words of it, 'but any such sum may "'be taken into account for the purposes of the final adjustment "'of the rights of the contributories amongst themselves,' it "would seem to mean that the sum which is sought to be "proved must be such as in its nature is susceptible of being "taken into account for the purposes of the final adjustment of "the rights of the contributories amongst themselves; and it is "difficult to see how that can be done where the person who "claims is not a past member liable to be made a contributory "of the company."

What surprises me is that neither in *In re New Chile Gold Mining Co.*,[17] nor, presumably, on the previous occasions on which Stirling J. had considered the question, was *In re Anglesea Colliery Co.*[18] cited; because it seems to be quite clear that Stirling J. is construing what was then section 74 and is now section 213 in the way in which one might well construe

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[14] L.R. 1 Ch. 555.

[15] 45 Ch.D. 598; 6 T.L.R. 462.

[16] 45 Ch.D. 598, 604.

[17] 45 Ch.D. 598.

[18] L.R. 1 Ch. 555.

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Consolidated Goldfields of New Zealand Ld., *In re.*

Roxburgh J.

it but for *In re Anglesea Colliery Co.*[19] If he had construed it in the manner in which *In re Anglesea Colliery Co.*[19] shows that it must be construed, the difficulty which appeared to confront him would have disappeared. It seems to me that the passage which I have read cannot stand as an obstacle to my decision, in view of what the Court of Appeal said in *In re Anglesea Colliery Co.*,[19] and the reasoning by which I have endeavoured to supplement the Court of Appeal decision.

Accordingly, I will declare that, having regard to the provisions of section 212, the liquidator should not treat the sum due to the past member by way of unclaimed dividend declared while she was a member of the company as a debt of the company ranking in competition.

Order accordingly.

Solicitors: *Birkbeck, Julius, Coburn & Broad.*

K. R. A. H.

[19] L.R. 1 Ch. 555.

In re HERWIN. HERWIN *v.* HERWIN.

[1952 H. No. 2210.]

C. A.

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July 16, 17.

Evershed M.R., Birkett and Romer L.JJ.

Administration—Will—Construction—Summons—Evidence—Appeal—Meaning of "children"—Application by defendants for leave to call further evidence—Duty of plaintiff trustees to make available all material information.

A testator, who died in 1950, by his will directed his trustees to hold his residuary estate, subject to the payment of an annuity to his second wife, upon trust "for such of them my children or "child (if only one) living at my death who shall attain the age "of twenty-one years. . . ." Administration with the will annexed was granted to the plaintiffs, the first of whom was the second wife. The testator had had no legitimate children. He had had three children by his second wife who were born during the subsistence of his first marriage. The plaintiffs took out a summons asking whether the gift to "children" took effect in favour of the three children. The only evidence filed was an affidavit of the second plaintiff, which gave no evidence as to the testator's health. The defendants filed no evidence.

Vaisey J. held that, having regard to the authorities, he was unable to conclude as a matter of construction that the testator intended to include illegitimate children. The testator might have

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hoped that his wife would have a legitimate child. He accordingly held that the gift to the children failed.

The children appealed. They applied by motion for leave to call further evidence: such evidence, being that of the testator's widow and of his doctor, was directed to establishing that the testator was, and knew that he was, when he made his will, impotent and incapable of having further children:—

Held, first, that if this had been hostile litigation in which the children were suing the executors, it might well be that their failure to bring this evidence to the attention of the court would have been fatal to their case. These proceedings, however, were by way of originating summons by the personal representatives of a deceased person asking for the directions of the court in the administration of the estate. It was the clear duty of personal representatives or trustees, when applying to a judge in the Chancery Division for administrative directions, to lay before the court all relevant facts which were within their knowledge. The beneficiaries, who were made defendants to the summons, were entitled to assume that all the facts material for the judge's consideration on the question brought before him would be presented to the court by the plaintiffs. Having regard to that procedural rule, the children were entitled to assume that, if there had been any evidence with regard to the impotence of the testator, a matter within the knowledge of the widow, who was one of the plaintiffs, she would have informed the court of it. In the circumstances, the children, one of whom was an infant, would not reasonably be expected to have interrogated the widow as to their deceased father's sexual capacity. The evidence could not reasonably have been obtained before the hearing and accordingly was admissible.

Held, secondly, that the evidence was conclusive as to the testator's intentions and the gift in favour of the children took effect.

Principles laid down in *Braddock* v. *Tillotson's Newspapers Ld.* [1950] 1 K.B. 47; 65 T.L.R. 553; [1949] 2 All E.R. 306 considered and applied.

Per Evershed M.R. Quaere whether in administration proceedings, if it comes to the knowledge of plaintiff personal representatives or trustees, after the hearing in the first court, that other facts should have been brought to the attention of the court, it is not their duty to bring those facts either before the Court of Appeal, or upon some further application in the administration proceedings.

In re Wohlgemuth [1949] Ch. 12; 64 T.L.R. 587; [1948] 2 All E.R. 882 followed.

Decision of Vaisey J. reversed.

APPEAL from a decision of Vaisey J.

The testator, William Rufus Herwin, by his will dated March 7, 1949, directed his executor and trustee to stand possessed of the trust fund representing his residuary estate " upon trust to " pay out of the income thereof an annuity of £250 to my wife

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"Annie Dorothea Herwin during her life and subject thereto "upon trust (as to both capital and income thereof) for such of "them my children or child (if only one) living at my death who "shall attain the age of twenty-one years or being daughters or "a daughter have attained or shall attain that age or previously "marry and if more than one in equal shares as tenants in "common."

By a codicil dated August 18, 1950, the testator bequeathed certain legacies, including (a) a legacy "to my wife Annie "Dorothea Herwin" of £100, and (b) "to my daughter Sheila "the sum of £500 upon her attaining twenty-one years."

The testator died on September 29, 1950. A grant of administration cum testamento annexo was made to the plaintiffs, Mrs. Annie Dorothea Herwin, the testator's widow, and Alec John Herwin. The testator was born on October 21, 1874. He married his first wife on April 6, 1896. She died on June 8, 1943. There were no children of that marriage. The testator married his second wife, the plaintiff, Mrs. Annie Dorothea Herwin (hereinafter called Mrs. Herwin), on June 15, 1943. The testator and the second Mrs. Herwin had been closely associated for some years before their marriage, the testator having had three children by Mrs. Herwin, all born during the subsistence of his first marriage.

The three children were William Sidney Rufus Herwin, who was born in September, 1920, and therefore was nearly 33; Frank Stuart Herwin, who was born in November, 1928, and therefore was about 24; and a daughter, Sheila Patricia Mary Herwin, who was born on August 8, 1933, and who had married. She was the daughter Sheila referred to in the codicil to the testator's will. She was not quite 20. No children were born to Mrs. Herwin after her marriage to the testator.

The question having arisen whether the disposition of the testator's residue in favour of "my children or child" took effect in the absence of any legitimate children, the plaintiffs, as the personal representatives of the testator, issued a summons in the Chancery Division, to which they joined as defendants the three children of the testator who were born to Mrs. Herwin before her marriage, and also four other persons as being next-of-kin of the testator who would take the residue (alone or with others), if the gift to the children should be found ineffective.

By the summons the plaintiffs, as administrators, asked for the determination of the question whether, upon the true construction of the testator's will and codicil, the devise and bequest to his children operated as an effective devise or bequest to the three illegitimate children, or who otherwise was entitled to the residuary estate.

The evidence, which supported that summons, consisted solely of an affidavit of Alec John Herwin, the second plaintiff and one of the administrators, in which, following the normal practice, he set out the relevant parts of the will, and then proceeded to state as follows: " During the lifetime of the said Clara Clayton " —that was the testator's first wife—" and during the subsistence " of the marriage referred to in paragraph 6 hereof "—that was, the marriage with Clara Clayton—" there were born to the said " Annie Dorothea Herwin by the testator three children." That was the whole of the evidence which was before the court as to the relationship of the children to the testator, or of the relevant circumstances of the testator from and after the date of his second marriage.

Having regard to the long-established line of authorities, Vaisey J. felt, on the material before him (and the admissible surrounding circumstances were very limited), that he was unable to conclude as a matter of construction that the testator's intention to comprehend illegitimate children, though likely, was certain. He therefore came, reluctantly, to the conclusion that the residue of the estate was undisposed of.

The three children appealed. On May 1, 1953, while the appeal was pending, they served a notice of motion upon the next-of-kin and the plaintiffs, asking, in accordance with the procedure normally adopted, that this court should give them leave to call fresh evidence upon the hearing of the appeal, that evidence being the evidence of Mrs. Herwin and the testator's doctor and directed to establishing that at the time when the testator made his will and codicil, and, indeed, at all relevant times, not only was he in fact impotent and therefore incapable of having any further children, but also that he was well aware of that fact.

The nature of the evidence which the children sought to call is stated in the judgment of Evershed M.R.

J. A. Armstrong for the children. The question is whether or not the testator's residuary estate goes to the appellants under the gift in his will to " children." To answer that question evidence is relevant which is directed to show that the testator at the time when he made his will knew that he could not have further children. The evidence which the children seek leave to call must be evidence the existence of which could not have been known to them when the case was heard, and which, if admitted, would have been, if not conclusive, at any rate of great weight below. It is clear that this evidence, if admitted, is conclusive that the testator, when he referred to "children," meant the appellants: *In re Wohlgemuth.** The children could not have known of the existence of this evidence at the time of the hearing. Their mother was one of the plaintiffs and they were entitled to assume that she would put all the relevant evidence known to her before the court. They could not have been expected to raise the question of the testator's possible impotence with her. If this evidence, which the administrators could have laid before Vaisey J., is excluded, the testator's children will not get the provision he made for them.

K. W. Rubin for the testator's next-of-kin. This evidence should not be admitted, since it could have been adduced at the hearing below. The children were well aware of the importance of this evidence, since before Vaisey J. they sought to show that the testator thought that his wife could have no more children. The fact that the plaintiffs and the children were represented by the same solicitors is not material, since the children were represented by separate counsel. The question of the capacity of the mother to have further children having been raised, that of the testator should have been raised at the same time. The necessary inquiries could easily have been made by the children. This evidence ought not to be admitted.

A. A. Spears for the administrators.

EVERSHED M.R. [having stated the facts, continued:] First, I must deal as a matter of principle with the question whether it is right that in this court the children should be allowed to tender further evidence. The rule which has been laid down—and which rests on the firm basis that it is in the public interest that there should be an end of litigation—has been stated many times, and recently in this court in *Braddock* v. *Tillotson's Newspapers Ld.*[1] That was a somewhat unusual case, in that the application was not to call a new witness, but to have a witness for the other side recalled in order that he might be cross-examined. The appellants in that case stated that they had no knowledge at the time of the trial, and had no reasonable means of finding out, that the particular witness was a person of light character, who might have been most effectively cross-examined as to credit had the facts been known to the appellants; and they further contended that the destruction of the credibility of that witness would, at the very least, have had a very strong influence upon the conclusion reached at the trial. Those facts indicate that it was a peculiar case; and, on the facts, not in the least like the present case, which is of the more usual character, namely, an application to lead fresh evidence in chief in support of the appellants' claim.

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* [1949] Ch. 12; 64 T.L.R. 587; [1948] 2 All E.R. 882.

[1] [1950] 1 K.B. 47; 65 T.L.R. 553; [1949] 2 All E.R. 306.

The decision of this court in *Braddock* v. *Tillotson's Newspapers Ld.*[1] was adverse to the appellants seeking to have the witness recalled, upon the ground that it was not in accordance with the principle which this court adopts to allow a witness to be recalled merely that he or she may be cross-examined as to credit.

Tucker L.J., in giving the leading judgment, referred to the general rule upon which this court acts, in language which I respectfully adopt and which it is convenient to cite. He said [2]: "It has been the invariable practice of the Court of Appeal in "this country to confine the admission of fresh evidence, in "circumstances such as this, to evidence which could not "reasonably have been discovered before the trial, and to evidence which, if believed, either would be conclusive or, as has "been said by some judges, to evidence which would lead to the "reasonable probability that the verdict would have been "different. But"—then the judge passed to the particular point before him, and said: "the practice has hitherto been "confined to evidence relating to an issue in the case, or at any "rate to an issue which could and might yet be raised if there "were a new trial in the action.

"No case has been cited in which this court has ever admitted "or has ever been asked to admit evidence going to credit only. "That, of course, is not conclusive; it is certainly not conclusive "as to the jurisdiction of this court and, for myself, I think that "this court clearly has jurisdiction to take any course which it "thinks fit with regard to a matter of this kind; but the invariable "practice is clear, and furthermore, when one comes to apply the "first test, namely, whether the evidence could have been "discovered by reasonable diligence before the trial, that

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[1] [1950] 1 K.B. 47.

[2] Ibid. 50.

" language is really hardly applicable to evidence of this kind, " because in the ordinary normal events a solicitor or a client " would not be expected, in the absence of unusual circumstances, " to go rummaging about, if I may so call it, into the past records " of any witness he may think was to be called. In fact, " generally speaking, he would not know who the witnesses were " who were going to be called."

Then he concluded the paragraph: " But I do not think it " is reasonable, with regard to a man in this position, that any " inquiries should be made; I am only saying that what has " always been regarded as the test—the essential test, namely " that the evidence could not have been obtained by reasonable " diligence—is hardly applicable to a case of this kind."

Later, the Lord Justice quoted a passage from Lord Loreburn L.C.'s speech in *Brown* v. *Dean*,[3] where he said: " My Lords, " the chief effect of the argument which your Lordships have " heard is to confirm in my mind the extreme value of the old " doctrine ' Interest reipublicae ut sit finis litium,' remembering " as we should that people who have means at their command " are easily able to exhaust the resources of a poor antagonist."

Those citations will suffice to lay the necessary foundation of law for the reasoning which now follows. There is a double obligation on an applicant in this court for leave to call further evidence. I will state the two conditions which have to be satisfied in the order in which Mr. Armstrong dealt with them. First, it must be shown that the new evidence which it is sought to call, if given, and if true, would be at least likely to have had a strong influence upon the conclusion in the court below; and, second, it must be established that such evidence is evidence not only in fact unknown at the date of the trial to the party applying, but it must be shown also that its existence could not with reasonable diligence have been discovered.

There has been no argument in this court on the first point. If it is established, as the evidence tends to show, that the testator not only was, from a date anterior to his will and ever afterwards for all his life, impotent, but also that he was well aware of that fact, then it seems to follow that he must be taken (the court, as is sometimes said, placing itself in the testator's armchair) to have used the words " children or child " so as to mean, and mean exclusively, his then existing children.

[3] [1910] A.C. 373, 374.

In saying that, I am restating the conclusion at which Jenkins L.J., when sitting as a judge of first instance, arrived in *In re Wohlgemuth*,[4] a case which was, in principle, on all fours with the present case. In that case the testator at all relevant dates was impotent, and knew it; the facts of his impotence and knowledge having been brought about as the result of a violent physical accident. In the present case, the result has been brought about by illness and an operation, but those are merely incidental matters, and the facts in both cases, this case and *In re Wohlgemuth*,[4] are in principle the same.

It follows, therefore, that, if the evidence is admitted and found to establish the essential fact, it satisfies one condition. But have the children satisfied the other condition? Have they shown that this was evidence which reasonable diligence on their part could not, and would not, have brought to light and enabled them to bring it to the attention of Vaisey J.? If this had been an action, by which I mean an action by writ of the ordinary kind, what is sometimes called hostile litigation, in which the children had sued the executors claiming payment to them of the residue which (they alleged) belonged to them, then it might well be (although I do not so decide, because it is unnecessary) that failure on their part at the trial to bring to the attention of the court all the relevant circumstances which might help their case, would be fatal thereafter, and that they could not, or might not, be allowed, in the circumstances, to have the privilege of a second attempt to prove their case.

But this action was not an action of that kind at all. It was a proceeding taken out under the rules applicable to the Chancery Division, whereby the plaintiffs, in their capacity as administrators, sought the directions of the court; and it is plain that, acting in that capacity, it was their duty, not only to the court but to all persons interested in the estate, to lay before the court all the facts which they had in their knowledge or possession which might assist the just determination of the questions which they raised. If, in such a proceeding—and this is in form an administration action—it appears, or comes to the knowledge of plaintiff executors or trustees after the hearing in the first court, that other facts should have been brought to the attention of the court, it is by no means clear to me that it is not their duty to bring those matters, even at so late a stage, before the court, either this court, or upon some further application in the administration proceedings.

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[4] [1949] Ch. 12; 64 T.L.R. 587; [1948] 2 All E.R. 882.

But the matter is in this case further complicated by the circumstance, as frequently happens in these cases, that at the time when the matter was brought before Vaisey J. the same solicitors were acting for the plaintiffs as were acting for the children. It is therefore said, and said with force, by Mr. Rubin, that the children and their advisers, if they had been properly alert, should have realized that matters of fact relating to the capacity to have children of either the testator or Mrs. Herwin, were vitally important. Indeed, Mr. Rubin observed that in the court below an attempt was made (albeit that it was obviously foredoomed to failure) to establish that Mrs. Herwin was at all material times incapable because of her age of having further children, and that the testator knew it. From the fact that that argument was raised, Mr. Rubin, naturally enough, argued that the question of capacity as a matter of fact must have been, or should have been, well in the mind of the plaintiffs and the children and their advisers.

It must not be thought from any observations which have fallen from me during the argument that I have been casting reflections upon the care or competence of the legal advisers. It is one of the best-known facts in life that it is easy to be wise after the event, and, unless some clue arose, I imagine that it would no more occur in proceedings of this kind to solicitors or counsel, than it would to the children of their mother, to raise with the mother the question whether in fact she or her late husband had been impotent at the material date. The matter is obviously one of delicacy, and relates to the most intimate details of married life. Applying Tucker L.J.'s test, which he indicated in the *Braddock* case,[5] I think that, in the absence of unusual circumstances which raised the question precisely, it is not reasonable, in proceedings of this character, to suppose that children (particularly if one of them happens, as in this case, to be an infant daughter) will interrogate their mother about the most intimate details of her married life and the capacity of their father.

As I have said earlier, it was the duty of the plaintiffs, making this application to the court, to lay before the court all facts that might assist the court to a just conclusion. But I am not surprised, in all the circumstances, that it did not occur to

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[5] [1950] 1 K.B. 47.

Mrs. Herwin, then, to tell her solicitors intimate details of this kind, or that it did not occur to the solicitors to ask her.

The will itself was a professionally drawn document, though the solicitor concerned was not the same as the solicitors acting for Mrs. Herwin and her children when the proceedings started; and again, it is not perhaps surprising that they did not draw the will otherwise than as they did, or ask the searching questions which I have indicated. If a mistake occurred in the use of the word "children," it was a mistake into which people may perhaps easily fall, although I have no doubt that it is true to say, as Mr. Rubin suggested, that anyone particularly experienced in cases of this kind, or particularly astute, might perhaps have thought it desirable to ask questions, and might, had the question been asked, have fallen upon the essential facts.

In my judgment, however, when the following circumstances are together considered: namely, first, the nature of the proceedings; second, the fact that the children, being defendants in proceedings of this kind, were prima facie entitled to assume that all the material facts would be put before the court and had been put before the court; third, that one of the children was an infant—when all these matters are considered in the light of the general nature of the evidence on this delicate subject-matter, I am for my part satisfied that we shall not be departing from the strict and proper application of the well-established rule, if we say that the children have made good their application and have fulfilled both conditions, which it is incumbent upon them to fulfil in order to have the further evidence brought to our attention.

That being so, I pass accordingly to what the evidence was. It consisted of the evidence of Mrs. Herwin and Mr. Adlington. First, the evidence of Mrs. Herwin, who, alone of the parties in the suit, could know the facts. She made an affidavit exhibiting a statement which, so far as material, was as follows: "The "testator was crippled with osteo-arthritis and suffered with a "weak heart for the last fifteen years of his life"—that is, from a date before the marriage—"He underwent a serious operation "in 1946"—that is, three years after the marriage—"and from "then on he was physically and mentally a very sick man. No "intercourse took place between us after that date because of his "physical condition. His inability to have connexion worried "him, and early in 1949 I consulted Mr. Adlington, who explained "to the testator that it was impossible in his state of health and "that he must regard his incapacity as permanent. I am con-"vinced that from that date, if not before, the testator recognized "his incapacity as being permanent." The date of the interview with Mr. Adlington is proved to have been shortly before, and not after, the date of the will.

In cross-examination Mrs. Herwin said that, in fact, the testator made no attempt to have intercourse with her almost from the date of the marriage, or at any rate from some date considerably before the date of the will. Mr. Rubin's point was that, although now it is obvious that he was incompetent, it did not follow that he knew it; and the fact that he had not made the attempt was something very different from the fact of knowledge that, if he did make it, he would be found to fail. I am bound to say, having seen Mrs. Herwin in the witness box and heard her answer to the question, that I see no reason to cast the smallest doubt on the correctness of her final statement, "I am convinced that from that date"—that is, from the date of the interview with Mr. Adlington—"if not before, the testator "recognized his incapacity as being permanent."

The matter is, in my judgment, made clear beyond a peradventure by the evidence of Mr. Adlington, who is a Member of the Royal College of Surgeons, and whose evidence seemed to me to be both clear and convincing. He gave, in his statement, details of the actual disability from which the testator was suffering. He stated that he had been attending the testator before March, 1949, and that his health was then very frail, and that that was due to his cardiac condition, and his arthritis. He said that he was having weekly injections of mersalyl to keep the swelling of his legs within limits. Mr. Adlington continued: "About this time he [the testator] appeared mentally distressed "and rather awkward. In view of what his wife told me, I questioned him on the subject, and he did confess to me that he was "worried because he was unable to have connexion with his wife. "I explained to him that I considered this failure to be quite "natural and that, in his state of health, it was really impossible "and permanent. He seemed to be happier after this explanation. I certainly do not think he had any idea of begetting "children, and I firmly believe he realized he was incapable." Then he gave the date of his interview as March 2, some two weeks before the date of the will.

I add that Mr. Adlington in the witness box, in answer to the questions put to him by Mr. Rubin and by members of the court, made it to my mind clear that the testator was not only incapable in fact, but was perfectly well aware of it at all relevant dates. If that is the fact, it seems to me that the conclusion is clear;

for the testator made a will referring to "my children" at a time when he had three natural children, and at a time when he could not have, and knew that he could not have, any legitimate children. In other words, the case is brought fairly and squarely within the decision of Jenkins J. in *In re Wohlgemuth.*[6]

The conclusion therefore necessarily is that the word "children" means, and meant, the three children appellants in this court; and it is unnecessary for us to consider the matter of construction which Vaisey J. decided without the immense advantage which this further matter of fact has given to us. The judge made it plain that he arrived at his conclusion with reluctance, and I fully understand that reluctance. Without hearing argument, it would not be right for me to suggest that his decision was otherwise than in accordance with the authorities. We have heard no argument, and I express no view, therefore, on how the matter would stand apart from the evidence which we have heard. But in the light of that evidence it is clear beyond doubt, to my mind, that the conclusion ought to be in favour of the children.

For those reasons I think that the appeal should be allowed, and that the declaration which the court should make is to the effect that the word "children" meant the three first defendants.

BIRKETT L.J. I am of the same opinion. The construction of the will is not a matter now to be discussed in this court, but there are two passages from the judgment of Vaisey J. which I want to cite. He began his judgment by saying: "Well-settled "principles of law and of construction compel me to decide this "case contrary to my inclination, and contrary, I believe, to the "true intention of the testator." Vaisey J. then cited a passage from *Megson* v. *Hindle*,[7] the judgment of Cotton L.J.: "To "take a case out of the common rule that only legitimate children "can take under a gift to 'children,' there must be on the face "of the will such a strong *probability* of the testator's intending "to include illegitimate children, that a contrary intention cannot "be imputed to him."

Then a little later in his judgment Vaisey J. said: "Cotton "L.J. says that to take the case out of the common rule that "only legitimate children can take under the gift to children I "must find on the face of the will something which really makes "it certain, not merely very *probable* or very likely, but certain,

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[6] [1949] Ch. 12.

[7] (1880) 15 Ch.D. 198, 205.

" that he must have been referring to his illegitimate children " or had intended the word ' children ' to include his illegitimate " children."

Then, when he came to consider the construction of the will in the light of the surrounding circumstances, Vaisey J. said: " I cannot say that the testator must have believed or must " have thought that no further child could be born of the marriage " which he had then contracted. Although, as I have said, I " should like to construe this will on what I regard as the " probabilities of the case, I am warned by so many authorities " that this rule is one which must be observed unless disregarding " it is the only way to give sense to the documents which fall to " be construed. Here I think that the testator might have hoped " that his wife was going to have a legitimate child at an age " at which women do have children, when approaching the time " when such an event is not a possibility. He may have thought " that his wife was going to have another child or might have " another child for whom he made provision, and, of course, it " is just possible."

It was because of those observations that the application was made in this court to adduce further evidence, because Mr. William Sidney Rufus Herwin in his affidavit said: " The facts " as to my father's capacity referred to in paragraph 10 of my " mother's said statement and in paragraphs 3 and 4 of the said " Basil Adlington's statement were unknown to me until after " the hearing of this matter in the court below. Shortly after " the hearing my mother expressed surprise to me at the reasons " given by the judge, and stated that it was impossible that my " father could have had the birth of other children in mind at " the time he made his will, as he then knew that he was " incapable of having further children."

So the issue in this court really resolves itself into this: was the further evidence, which was sought to be adduced, properly admissible upon this appeal? The two matters to which counsel directed his attention were, of course, the two matters which stood out prominently in the judgment of Tucker L.J. in *Braddock* v. *Tillotson's Newspapers Ld.*[8]—that it must be shown that the evidence sought to be adduced would be conclusive, or might tend to that end; and further, that the evidence sought to be adduced could not reasonably have been discovered before the trial.

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[8] [1950] 1 K.B. 47.

I do not desire now, in view of what my Lord has said, to add many words about that. It is plain, I should have thought, in view of the decision of Jenkins J. which has been cited, that if this evidence had been before the judge, in view of the statement which he made about the possibility of having a child, it is probable, or almost certain, that there would have been a different decision. In my view the evidence, if it is admitted, is quite conclusive.

On the second point, whether it could reasonably have been discovered before the trial, my Lord has dealt with that in some detail, and I do not desire to add anything, except to concur in the view that, looking at the matter, as I think one should, in the light of the authorities, it is true here to say that the admission of this evidence, as we have decided to admit it, accords, when all the facts are known, with the principles of law which were laid down in *Braddock's* case [8] and have been applied in many other cases. That being so, I think that the admission of this evidence is really conclusive of this matter, and I am content therefore to say that I agree with the judgment which has been given by the Master of the Rolls, and with the conclusions which he stated.

ROMER L.J. I also agree, and have very little to add. What is plain to me is that, if the evidence which has been adduced before this court had been before Vaisey J., he would have decided this case in the way in which we are deciding it to-day, because, having regard to the decision in *In re Wohlgemuth*,[9] the evidence was not only admissible, but was conclusive of the question as to what the testator in his will meant by the use of the word "children." But the evidence was not before Vaisey J., and he decided the matter purely as one of construction; and the only question to my mind is whether the evidence could properly be admitted in this court.

It has to be borne in mind that these are proceedings by way of originating summons by the personal representatives of a deceased person, asking for the directions of the court in the administration of the estate, and it is the clear and traditional duty of executors or trustees, when applying to a judge in the Chancery Division for administrative directions, to lay before the court all relevant facts which are within their knowledge. I am not for one moment casting blame on anybody for the fact that a highly relevant matter was not introduced into the evidence in the court below, but nevertheless, as I see it, the beneficiaries, who were made respondents to this summons, were entitled to assume that all the relevant facts, that is to say, all the facts material for the consideration of the judge on the question which was being brought before him, would be presented to the court by the plaintiffs.

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[8] [1950] 1 K.B. 47.

[9] [1949] Ch. 12.

Nothing could be more plain than that the question upon which Mr. Adlington has informed the court, both by affidavit and orally, was material; and the one person above all others who was in a position to know of the facts which the doctor has stated was Mrs. Herwin, who was one of the plaintiffs on the summons. It seems to me, therefore, that having regard to the general procedural rule to which I have referred, which has long been accepted in the Chancery Division, the children, the appellants here, were entitled to assume that, if any evidentiary matter of that kind existed, and was known to Mrs. Herwin, she would have informed the court about it. That consideration is relevant because of the way in which Tucker L.J. in *Braddock* v. *Tillotson's Newspapers Ld.*[10] approached one aspect of this question of the admissibility of evidence on appeal. He said: "In the "ordinary normal events a solicitor or a client would not be "expected, in the absence of unusual circumstances, to go rum-"maging about, if I may so call it, into the past records of any "witness he may think was to be called."

So here, having regard to the fact that this was an application upon which it was the duty of the plaintiffs to lay all the material and available information before the court, I do not think that the children, more especially this young girl of 19, could reasonably be expected to go rummaging about into the question of their deceased father's sexual capacity, by interrogating their mother on the subject; and I do not think that it was unreasonable of the children, in all the circumstances of the case, not to have made inquiries of their own upon that subject. It seems to me, accordingly, that we are not departing in any way from the rules which have been laid down frequently with regard to the admission of new evidence in this court, by admitting the evidence of the doctor, supplemented by the further affidavit which Mrs. Herwin herself swore. Indeed, it would be deplorable, to my mind, to exclude it in a case where the court is being asked to give directions in the administration of the estate of a deceased person, and for the court to shut its eyes to the facts, which are decisive of the testator's intention, and by so shutting them, to cause his estate to be administered in a way which the court now knows would be wholly contrary to his intention.

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[10] [1950] 1 K.B. 47, 50.

Accordingly, I agree that this appeal must be allowed, and I desire to say nothing on the question of construction, which was the only matter with which Vaisey J. dealt, and which was not argued before us.

Appeal and application allowed.

Solicitors: *Wilkinson, Howlett & Moorhouse; H. E. Thomas & Co.; Clutton, Moore & Lavington.*

B. A. B.

1953
May 1.
Harman J.

In re ROOKE. ROOKE *v.* ROOKE AND OTHERS.

[1950 R. No. 738.]

Will—Construction—Direction to trustees to sell farm "as soon as "possible" after death—Whether implied power to postpone sale —Residuary gift—Substitutionary gift to issue—Death of donee of share of residue without issue—Effect—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 25 (1).

The testator, who died on November 26, 1948, by his will, dated October 8, 1948, directed his trustees "as soon as possible "after my death" to sell his farm, the proceeds to fall into residue. He devised the whole of his residuary estate to his trustees upon trust for his wife for life and afterwards to his named brother and sisters "and in case of either of my brother or sisters "shall be dead at the time of my wife's decease I give their "respective share of my residuary estate to their respective issue ". . . I direct that my trustees during my wife's lifetime may if "they deem it advantageous . . . retain any investment that my "estate may consist of at my death although same may not be an "investment allowed by law for the investment of trust funds."

Six months before the date when the testator made his will the Metropolitan Water Board, pursuant to its statutory powers, announced that it proposed to build a reservoir in the area where the testator's farm lay, and this proposal had resulted in a sharp fall in the value of properties within or in the vicinity of the area of the proposed scheme. In November, 1949, the scheme was dropped.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

After the testator's death his widow continued to live on the farm and carry on its business. The persons interested in residue expectant on the death of the testator's widow made representations that it was the duty of the trustees to sell the farm forthwith.

In April, 1950, a sister of the testator died, a spinster:—

Held (1) that the reference to "investment" contained in the will meant investment in its strict sense, and did not include the farm; accordingly it was not one of the assets which formed part of the testator's estate at his death which the trustees had power to retain during his widow's lifetime;

(2) that the trustees had no power in their discretion to postpone the sale of the farm, as any power to postpone implied by virtue of section 25 of the Law of Property Act, 1925,[1] was excluded by a contrary intention expressed in the will; the testator intended that his farm should be sold immediately after his death, and he did not intend to confer any power in his trustees to postpone that act.

Dictum of Luxmoore J. in *In re Ball* [1930] W.N. 111; 74 S.J. 298, as to the effect of section 25 of the Law of Property Act, 1925, questioned.

(3) That the gift to the testator's sister who died did not fail by reason of the fact that she died in his widow's lifetime without leaving issue, but devolved on her estate. It was plain that the substitutionary gift was only meant to operate in favour of a certain class, viz., issue of the deceased beneficiary, and that it only came into operation if there was some person or persons entitled to take under it.

Dictum of Jessel M.R. in *Hurst* v. *Hurst* (1882) 21 Ch.D. 278, 293 applied.

ADJOURNED SUMMONS.

The testator, Frederick James Faukland Rooke, who died on November 26, 1948, was for thirty years before his death owner in fee simple of a farm, "Woodhouse," situated in the Enborne Valley.

In May, 1948, it was announced in the national and local press and in farming journals that the Metropolitan Water Board, pursuant to its statutory powers, was proposing to construct a reservoir in the valley in the area in which the testator's farm lay. As a result of this proposed scheme the value of properties, including farm properties, which were situated within or in the vicinity of the area to be submerged, depreciated considerably in value. In November, 1949, the board announced that it had decided not to proceed with the scheme, although no assurance was given that it had been finally abandoned.

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[1] Law of Property Act, 1925, s. 25 (1): "A power to postpone sale "shall, in the case of every trust for "sale of land, be implied unless a "contrary intention appears."

The testator, by his will dated October 8, 1948, bequeathed a number of pecuniary legacies to his employees "in recognition "of their loyal service to me, but I hereby declare that such last "mentioned five legacies shall not be paid and shall be deemed "to have lapsed in the event of the proposed scheme for a reservoir going through as I fear that it will greatly depreciate the "value of my property," and after such bequest he directed his trustees if his house farm lands and premises known as "Wood"house" and his live and dead stock had not been sold at the time of his decease "to as soon as possible after my death sell "the same and after paying the costs of such sale the net pro"ceeds shall fall into and form part of my residuary estate."

The testator devised and bequeathed the whole of his residuary estate both real and personal to his trustees upon trust "to permit and allow my . . . wife to receive and enjoy the net "income dividends and use thereof during her life and on her "death I give devise and bequeath my said residuary estate to "my trustees upon trust to sell call in and convert the same into "money and after paying the costs of such sale calling in and "conversion to pay and divide the net proceeds unto and equally "between my brother Sidney Turner Rooke and my sisters "Maud May Lubbock Louisa Anne Taylor and Gertrude Edith "Rooke and in case of either of my brother or sisters shall be "dead at the time of my wife's decease I give their respective "share of my residuary estate to their respective issue and if "more than one equally between them. I direct that my trustees "during my wife's lifetime may if they deem it advantageous "have full power to sell or vary all or any part of my estate and "may retain any investment that my estate may consist of at "my death although same may not be an investment allowed "by law for the investment of trust funds."

The testator's residuary estate consisted principally of the farm property "Woodhouse"; the other assets amounting to some £1,000. For some months after his decease his executors carried on the business of the farm during which time they sold a considerable part of the live and dead stock. About the middle of 1949 the testator's widow took over the remainder of the live and dead stock at a valuation and had since carried on the farming business.

The persons interested in residue made representations that it was the duty of the executors to sell the farm property forthwith.

In April, 1950, the testator's sister Gertrude Edith Rooke, one of the persons interested in his residuary estate, died, a spinster.

The present summons raised the questions whether on the true construction of the testator's will: (1) the trustees had power in their discretion to postpone the sale of the farm property known as "Woodhouse" and to retain the same as an investment of the testator's residuary estate so long as they should think fit so to do; (2) in the events which had happened the share in the testator's residuary estate which his sister Gertrude Edith Rooke would have been entitled to if she had survived the testator's widow devolved subject to the widow's life interest either (a) upon the legal personal representative of Gertrude Edith Rooke, or (b) as upon an intestacy of the testator, or (c) in any and if so what way.

D. A. Ziegler for the plaintiff, one of the trustees of the will. By virtue of section 25 (1) of the Law of Property Act, 1925, a power to postpone the sale of this farm is given to the trustees unless a contrary intention can be said to appear from the will. No contrary intention appears, for there is no provision in the will which is inconsistent with the view that the statutory power of postponement is to be implied. Compare the analogous case of section 27 of the Wills Act, 1837, in which there occur the words "unless a contrary intention is expressed in the will," and the observations thereon of Page Wood V.-C. in *Scriven* v. *Sandom*,[2] cited by Sargant J. in *In re Doherty-Waterhouse.*[3] The testator's direction to the trustees to sell the farm "as soon "as possible" after his death does not oust the implication of the statutory power to postpone sale and leaves the question of sale to the discretion of the trustees.

E. M. Winterbotham for the testator's widow. Even if on its true construction the power to retain or postpone the sale of any part of the residuary estate is held not to apply to the farm, nevertheless it is submitted that a power to postpone must be grafted on to the proviso concerning the trust for sale of the farm, by virtue of the mandatory language of section 25 (1) of the Act of 1925: "A power to postpone sale *shall*, in the case of every "trust for sale of land, be implied unless a contrary intention "appears."

With regard to the second question, the testator's sister

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[2] (1862) 2 J. & H. 743, 744.

[3] [1918] 2 Ch. 269, 272.

Gertrude having died during the lifetime of his widow, her share of residue devolves as upon his intestacy, on the principle of *Doe* d. *Blomfield* v. *Eyre*,[4] which has been frequently applied in subsequent cases: see in particular *In re Bold, decd.*[5]; see also Theobald on the Law of Wills, 10th ed., p. 454. [Reference was also made to *Hurst* v. *Hurst*.[6]]

Claud G. Allen for persons interested in residue, who included the personal representative of the deceased sister. The will, on its true construction, gives the trustees no power to postpone the sale of the farm. The phrase "as soon as possible" shows that the testator's direction to the trustees to sell the farm is imperative and that they have no discretion in the matter. It is plain from the language of the will that the testator never intended that his widow should enjoy the farm in specie during her life, but only the proceeds of its sale. Further, it is submitted that the word "investment" is used in its strict sense, and that it does not include the farm, so that, accordingly, the farm does not come within the ambit of the express power to retain. The present case is covered by *In re Smith*,[7] in which North J. held that a direction to trustees to sell "with all convenient speed" meant that the trustees had no discretion to postpone. If it is contended that section 25 (1) of the Law of Property Act, 1925, has made a material difference, and that therefore *In re Smith*[7] is inapplicable, see the observations of Luxmoore J. in *In re Ball*,[8] in which he stated that section 25 (1) has not altered the law. Since 1925 it is still necessary first to construe the will to ascertain whether or not the testator intended an immediate sale of his property after his death; the only effect of section 25 (1) was to imply a power to postpone where none existed before. In any event, in this will there is plainly a contrary intention expressed which excludes the operation of section 25 (1).

On the second question, on the true construction of this gift, Gertrude's share of residue devolves on her personal representatives. *Doe* d. *Blomfield* v. *Eyre*,[9] and the subsequent decisions which have applied the principle therein stated, and also the cases concerned with bequests in which the gift over is to arise on a double contingency, are distinguishable. It is plain that the testator only intended the gift over to take effect if Gertrude had children to take under it: see Jarman on Wills, 8th ed., pp. 1445,

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[4] (1848) 5 C.B. 713.

[5] (1926) 95 L.J.Ch. 201.

[6] (1882) 21 Ch.D. 278.

[7] [1896] 1 Ch. 171.

[8] [1930] W.N. 111, 120.

[9] 5 C.B. 713.

1446. [*Smither* v. *Willcock*[10]; *Master* v. *Scales*[11]; *Greenwood* v. *Greenwood*[12]; *In re Brooke*,[13] were also referred to.]

HARMAN J. The first question which I have to determine is whether there is power to postpone the sale of the testator's main asset, a freehold farm in the Enborne Valley, in Hampshire. When he came to make his will, this farm was under the shadow of a scheme whereby the Metropolitan Water Board was going to cover it with feet (or fathoms, for all I know) of water in order to make a reservoir for the sustenance of the citizens of London. That naturally had had a depressing effect on agricultural values in the Enborne Valley, and it seems to me quite clear that the testator, when he came to make his will, had been thinking of getting rid of his farm in order to save something from the wreck. He had this freehold asset and very little else, only about £1,000, outside it.

The testator made his will on October 8, 1948, and his first bequests were certain small pecuniary legacies to employees "in "recognition of their loyal service to me, but I hereby declare "that such last mentioned five legacies shall not be paid and "shall be deemed to have lapsed in the event of the proposed "scheme for a reservoir going through as I fear it will greatly "depreciate the value of my property." I should construe that so as to limit in some way the reference to that scheme going through; whether in his lifetime or before the legacies, which fall to be paid a year after his death, are due. It shows the state of his mind.

He went on in these words: "I direct my trustees if my "house farm lands and premises known as 'Woodhouse' and my "live and dead stock have not been sold at the time of my "decease"—and that shows that he was thinking of selling them himself—"to as soon as possible after my death sell the "same and after paying the costs of such sale the net proceeds "shall fall into and form part of my residuary estate." That he gave to his trustees on trust to permit his wife to enjoy and receive the net income during her life.

Now there is no express gift of the farm to the wife or to anyone else. There is a direction to sell the farm as soon as possible and that the proceeds—not the farm—are to fall into residue. The residue is then given upon trust to allow the widow to receive the income; but that means that she is to receive the income of the proceeds of sale of the farm, and he does not contemplate that she shall ever enjoy the farm as such in specie.

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[10] (1803–4) 9 Ves. 233.

[11] (1850) 13 Beav. 60.

[12] (1939) 55 T.L.R. 607.

[13] [1953] 1 W.L.R. 439.

On her death he devised his residuary estate—that is to say, the proceeds of sale of the farm and any other assets—upon trust to sell and convert into money and to divide the net proceeds in certain shares. This latter trust for sale only applies when the widow is dead, and to whatever investments then represent the proceeds of sale of the farm, and to whatever other assets may have been retained during the widow's lifetime. The will continues: "My trustees during my wife's lifetime may "if they deem it advantageous have full power to sell or vary "any part of my estate"—that must mean assets other than the farm proceeds or investments of the farm proceeds; it does not apply to the farm itself—"and may retain any investment "that my estate may consist of at my death although same may "not be an investment allowed by law for the investment of "trust funds." To make the will read consistently, "investment" there must mean investment in its strict sense. It cannot, in my judgment, mean the farm, because the power to retain that as an investment will not, in my judgment, read consistently with the direction to sell as soon as possible.

Now, it is said that, by virtue of section 25 of the Law of Property Act, 1925, even though the power to retain and the power to postpone at the end of the will do not apply to the farm, a power to postpone still has to be implied as a proviso, so to speak, upon the trust for sale of the farm. It is pointed out that the section is mandatory: "A power to postpone sale "shall, in the case of every trust for sale of land, be implied "unless a contrary intention appears."

Now, the crux of the present case is: does there appear from this will a contrary intention? My attention was called to the decision of Sargant J. in *In re Doherty-Waterhouse*,[1] which was concerned with section 27 of the Wills Act, 1837, where there are the words "unless a contrary intention is expressed in the will." Sargant J. cited Page Wood V.-C.'s view in *Scriven* v. *Sandom* [2] that "there is no contrary intention within the meaning of the "statute, unless you find something in the will inconsistent "with the view that the general devise was meant as an execu- "tion of the power." Therefore it is said in the present case that one must find something in this will inconsistent with the view that the statutory power of postponement is to be implied, and that there is nothing inconsistent with a direction to sell at once. It only indicates a discretionary power to postpone.

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[1] [1918] 2 Ch. 269, 272.

[2] 2 J. & H. 743, 744.

On the other hand, there were cited to me two cases; one, *In re Smith*,[3] a decision of North J., where, in construing a trust to sell "with all convenient speed" the judge held that there was no discretion to postpone; but, of course, that was in 1895, before the passing of section 25 of the Law of Property Act, 1925. It was then contended that section 25 has not altered the law, and that Luxmoore J. has said so in *In re Ball*,[4] reported in the Weekly Notes of 1930. The report is a most imperfect one, and another report, that in the Solicitors' Journal, though less inaccurate is even briefer. That was a case where the property had vested absolutely and the trustees nevertheless alleged that they had a power to postpone sale, although there was no unanimous request to them to postpone it on the part of the beneficiaries. Luxmoore J. said that under the old law when all the shares were vested in this way a power to postpone lapsed, and that the law in that respect had not been altered by section 25. With that everybody would agree, but not perhaps with the wider pronouncement as to the effect of section 25 credited to the judge. It is clear that section 25 did alter the law by causing a power to postpone to exist where none existed before.

I am, however, left with this question of construction: is there here apparent a contrary intention? In my judgment there is. This testator meant this farm to be sold at once if it had not been sold in his lifetime, and he did not intend any power in his trustees to postpone that act. It does seem to me that the words are sufficiently imperative to make them inconsistent with a discretionary power of postponement, and, therefore, taking Page Wood V.-C.'s test, on the true construction of the will there is here apparent an intention contrary to any power to postpone this sale.

It is, I think, regrettable that the beneficiaries interested in the residue should take this view, because it does not appear that their fears have any substance; but with that I am not concerned. They are entitled to their rights under the will. The trustees, in my judgment, have no right of general postponement, although they are not to be forced to sell in the next month or so; but they must, as soon as they conveniently can, sell the property if the beneficiaries or some of the beneficiaries continue to insist that that should be done.

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[3] [1896] 1 Ch. 171.

[4] [1930] W.N. 111; 74 S.J. 298.

I declare, therefore, in answer to this question, that on the true construction of the will the trustees have no power in their discretion to postpone the sale and retain the farm as an investment.

The second question I have to determine is a point much encumbered with authority. The testator directed that after the death of his wife, his trustees were to sell his estate and pay and divide the net proceeds "unto and equally between my "brother" and his three sisters, naming them, "and in case "of either of my brother or sisters shall be dead at the time of "my wife's decease I give their respective share of my residuary "estate to their respective issue and if more than one equally "between them."

One sister, Gertrude Edith Rooke, survived the testator, but died a spinster before the tenant for life. The question is: did the share of Gertrude Edith Rooke, being a vested share, as it was, remain vested in her, or was it divested by virtue of the fact that she was dead at the widow's decease, notwithstanding the fact that she had no issue to take under the gift over? That, I think, is a much vexed question.

Ever since *Doe* d. *Blomfield* v. *Eyre*,[5] decided in the Exchequer Chamber, the law has been as laid down in the judgment of the court by Parke B. in these terms: "If a testator "were to devise to A.B. in fee, and to direct, that, in the "event of A.B. dying in the lifetime of J.S., the estate should "go over to a charity, it surely is perfectly clear, that, if A.B. "died in the lifetime of J.S., he, A.B., or, rather, his heirs, "would lose the estate. The testator could not give to the "charity, without taking away from the devisee. The testator, "therefore, in such a case, by his will says: 'If A.B. dies in "'the lifetime of J.S., I do not mean that A.B. or his heirs "'should any longer have the estate.' The estate of A.B. is in "such case defeated, not by the giving over of the estate to the "charity, but by the happening of the event on which the "testator intended it should go over. So, in the case before "us: the testatrix (for, for this purpose, she may be treated as "an ordinary testatrix) says, in substance: 'If my son John "'and his brother William die in their father's lifetime, I do "'not mean him (John) to have the property; but I give it over

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[5] 5 C.B. 713, 746.

"'to strangers.' That which defeats the estate of John, is, the "death of himself and brother in his father's lifetime, not the "giving over of the estate to strangers. The reason why John's "representatives cannot claim the property, is, that his mother "expressly declared, that, in the event which happened, he "should not have it."

That is a very clear statement of what the law ordinarily is, and it has been followed ever since, albeit with a good deal of reluctance. But, of course, it will not be followed if, upon the true reading of the will, the gift over was only intended to operate in favour of some person who could take under it; and, indeed, *Lassence* v. *Tierney*[6] and *Hancock* v. *Watson*,[7] and cases on that line have long told us that where one starts with a vested gift it will not be divested in the ordinary way except in favour of persons existing to take under the gift over. So I should have thought, and so I think would many of my brethren or predecessors, that in the ordinary way, where one gives a gift to A and provides that if he dies before a life tenant it should go over to some class or other of remaindermen, one only intends to take A's gift away if there are remaindermen to take. However, that is the law only in exceptional cases.

Kindersley V.-C., in *Robinson* v. *Wood*,[8] rather reluctantly held himself bound by *Doe* d. *Blomfield* v. *Eyre*.[9] In a more modern case, *In re Bold, decd.*,[10] P. O. Lawrence J. held that he must apply *Doe* d. *Blomfield* v. *Eyre*.[9] There the gift over was of a moiety of the trust fund which was to go to the testatrix's brother E. H. "provided always that if my said brother Ernest "Hartland shall die without leaving any issue living at his death, "the last-mentioned moiety of the said trust funds shall be held "in trust for the said J. D. Scott if he shall attain the age of "21 years or marry under that age." He did not attain 21 or marry under that age, and it was held that, nevertheless, the gift went over.

P. O. Lawrence J., after discussing *Doe* d. *Blomfield* v. *Eyre*,[11] said[12]: "The sole contingency upon which the interest "of Ernest Hartland is to be divested is the event of his dying "without leaving issue living at his death. In that event his "interest, in my judgment, on the construction of this will, is

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[6] (1849) 1 Mac. & G. 551.
[7] [1902] A.C. 14.
[8] (1858) 27 L.J.Ch. 726.
[9] 5 C.B. 713.
[10] 95 L.J.Ch. 201.
[11] 5 C.B. 713.
[12] 95 L.J.Ch. 203.

"divested; and, inasmuch as the gift over has failed, there will "be an intestacy."

In the present case it is contended that the event did not happen and that the rule applies. The rule is stated in Theobald on Wills, 10th ed., p. 454, in these perfectly general terms: "A vested interest, which is given over in certain events, is "divested if those events happen, though the gift over may be "void. . . ."

There is an admitted exception in cases of perpetuity discussed by Cohen J. in *In re Pratt's Settlement Trusts*,[13] to which I need not further refer.

When I look at the latest edition of Jarman on Wills (8th ed., pp. 1445, 1446)—and in this it is not inconsistent with the older editions—I find this: "We have already discussed the rule that, "where an estate is devised on a contingency in partial derogation of a preceding estate in fee, the original devise is only "affected to the extent necessary for the introduction of the "contingent estate." That would suit this case and would suit the interests of the deceased sister. There follows a long quotation from the original work of Mr. Jarman showing that that would be the natural way to construe the will. But the editor goes on in these words: "But it would appear to be clearly "settled that the principle of *Doe* d. *Blomfield* v. *Eyre* [14] applies "to personalty as well as realty, so that where there is an "absolute gift, followed by a gift over on the happening of a "certain event, the prior gift is defeated on the happening of "the event, although the gift over fails." Then he refers to *O'Mahoney* v. *Burdett* [15] and continues in these terms: "But "the principle does not apply in those cases 'in which it is plain "'that the original gift was not intended to be defeated unless "'there [are] objects to take under the gift over, as for instance, "'in cases of substitutionary gifts to children.'" That last citation is taken from Jessel M.R.'s judgment in *Hurst* v. *Hurst*,[16] a case which bore on subject-matter very foreign to this, except that it was necessary to construe the will in order to see whether there was a forfeiture.

After the statement I have just quoted, Jessel M.R. continued: "But here we have an intention separately declared that "the gift is to be forfeited." Then he said: "If the forfeiture is "expressly limited to take effect on the event mentioned in the

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[13] [1943] Ch. 356; 59 T.L.R. 352; [1943] 2 All E.R. 458.

[14] 5 C.B. 713.

[15] (1874) L.R. 7 H.L. 388.

[16] (1882) 21 Ch.D. 278, 293.

"first branch of the clause effect must be given to it, though "there be nothing to be accelerated under the second branch." Then he considered *Doe* d. *Blomfield* v. *Eyre*,[17] *Robinson* v. *Wood*[18] and *O'Mahoney* v. *Burdett*,[19] and came to the conclusion that there was in that case a forfeiture.

But what about the exception? Is he not suggesting that, where the only gift over is a gift over in favour of the children or issue, that is a sufficient indication to the court that the gift is only meant to be defeated in favour of issue, and if none, then not?

It is not quite like *Salisbury* v. *Petty*,[20] where the gift was merely to A or B, because there it is clear that the testator intended either A or B to take and B only if A is not alive. In that case immediate legacies were bequeathed to B, C and D or their issue, and further legacies were bequeathed, subject to a prior life interest in A, to B, C and D or their issue. B died in the lifetime of A, without issue, and C and D died in the lifetime of A, leaving issue. Wigram V.-C. had no difficulty in coming to the conclusion that B took both his legacies absolutely, C and D took their two legacies, while the children of C and D took the further legacies by substitution for their parents.

There are also at least two or three other cases in which gifts to issue have been treated as purely substitutionary. *Smither* v. *Willock*[21] is an example. It is a very brief report, but it is a clear decision. The substitution there was to the children of the first taker. "The Master of the Rolls declared the share of the "deceased brother to be vested, subject to be divested only in "the event of his death in the life of the testator's widow, "leaving children; and consequently, that event not having "happened, his representative was entitled." That case is stated as being the law in Jarman on Wills, 8th ed., p. 1446.

It is also cited in a decision of the Privy Council, *Greenwood* v. *Greenwood*,[22] which is of less value because it was not argued on both sides.

What then am I to conclude? I do not find any case where, there being a substitutionary gift in favour of children (which is the case here as this is a mere substitutionary gift introduced by the words of contingency "in case") the divesting has been held

[17] 5 C.B. 713.

[18] 27 L.J.Ch. 726.

[19] L.R. 7 H.L. 388.

[20] (1843) 3 Ha. 86.

[21] 9 Ves. 233.

[22] 55 T.L.R. 607; [1939] 2 All E.R. 150.

to be anything but a partial divesting operating to the extent necessary to let in the remaindermen.

If I am at liberty to do so, it certainly seems to me that the natural way of construing this will is to hold that the testator only intended his brother and sisters to be defeated if they died in his widow's lifetime either leaving children, or having had children. It is said that the authority of *Doe* d. *Blomfield* v. *Eyre*[23] defeats that view, but in my judgment it does not. I am at liberty, in my judgment, in cases where substitution is in favour of children, to follow the words of Jessel M.R., who said in *Hurst* v. *Hurst*[24] that the principle did not apply in cases where it was plain that the substitution was only meant to operate in favour of a certain class, as in substitutionary gifts to children or issue. This is such a substitutionary gift. It is in my judgment plain that the gift over was meant to operate only if there was somebody to take under it.

There being nobody, the right given to the sister which vested in her at the testator's death has not been divested because she never had a child.

I shall therefore declare that it devolves on the legal personal representative of Gertrude Edith Rooke.

Declarations accordingly.

Solicitors: *Hunters for Louch, Belcher & Co., Newbury; Lane & Cottier for Charles, Lucas & Marshall, Newbury.*

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[23] 5 C.B. 713.

[24] 21 Ch.D. 278.

C. A.

1953
May 4, 5, 6, 7, 8, 11, 12, 14, 15;
July 1.

Evershed M.R., Denning and Romer L.JJ.

In re SHEPHARD.

SHEPHARD AND ANOTHER *v.* CARTWRIGHT AND ANOTHER.

[1951 S. No. 2626.]

Advancement — Qualified and conditional gifts — Shares registered by father in names of his children—Children not informed of transaction—Shares sold and proceeds of sale dealt with under mandates signed by children—Children unaware of nature of transactions until father's death—Whether children entitled to claim on basis of advancement—Admissibility in evidence of subsequent conduct of donor.

In 1929 a father with an associate promoted a number of small companies and caused the shares to which he was entitled to be allotted in varying proportions to his three children, one of whom being then an infant. There was no evidence as to the circumstances in which those allotments were made. The companies were very successful, and in 1934 the father and his associate promoted a public company which acquired the shares of all the private companies for £700,000, of which £300,000 was to be satisfied in cash and £400,000 in shares. The father never informed his three children of that sale. On the formation of the public company they signed, without appreciating what they were doing, the necessary documents to enable their father to sell their shares in the private companies and receive the consideration, which he did, paying the cash consideration into his own account. Shortly afterwards he caused such moneys to be divided roughly in proportion to their interest in the private companies and paid into three deposit accounts standing in the names of his three children. Subsequently, the father procured from the children mandates authorizing the bank to honour the father's signature for withdrawals from those accounts. In signing those mandates, the children did not appreciate what they were doing. The father subsequently withdrew the whole of the sums from the deposit accounts and used them for his own purposes. In 1935 he promoted an estate company and caused the children to be entered in the company's books as creditors on loan account for large sums. He also effected a number of other transactions resulting in shares or interests in various companies and businesses being vested in one or other of his children. The father also from time to time purchased house properties in the names of his children; the children were informed of these purchases.

In 1949 the father died, having by his will, after making certain legacies, left his residuary estate to his three children. They then learnt of the original allotment of shares to them and of the subsequent dealings with the proceeds of sale. In these proceedings two of the children claimed as creditors against the executors the balance of the moneys representing the proceeds of sale of the shares allotted to them in 1929, on the footing that the allotments were advancements, and accounts. Their claim would have entirely exhausted the estate. It was opposed by the third child.

Harman J. dismissed the action. He held, first, that the subsequent conduct of the father in dealing with the shares and the proceeds of sale was admissible in evidence to negative any intention of advancement when the shares were allotted to the plaintiffs. Secondly, that the father did not intend either by the allotments or subsequent transactions to make out-and-out gifts. On appeal:—

Held, that the onus was on the plaintiffs to establish the making of absolute and unqualified gifts by the father, and that they had failed to discharge it.

Per Evershed M.R.: The transactions of 1929 amounted to advancements to the children (in the sense that the father intended to confer benefits on them), but they were of a qualified character, leaving the father a power of control and, if necessary, of revocation—a dominion over the subject-matter advanced; the advancements were not of such an absolute character that the father's estate was accountable for the sums withdrawn from the relevant deposit accounts.

Devoy v. *Devoy* (1857) 3 Sm. & G. 403 referred to.

Per Denning L.J.: If there was initially an advancement, the plaintiff children would have had a good cause of action, but the father never intended to make a gift to them at all.

Per Romer L.J.: The father intended to confer a gift on the children, but one that was future, nebulous, and subject to an overriding control which was to remain vested for an indefinite period in himself; the intention was comparable to that in *Devoy* v. *Devoy* (supra).

On the question whether it was legitimate to take into account conduct on an alleged donor's part subsequent to the alleged gift, which tended to show that no gift was intended:—

Per Evershed M.R.: It was not suggested that evidence was inadmissible of conduct of an alleged donor subsequent to the alleged gift, which tended to show recognition of the gift. There could not be excluded other parts of the evidence tending in the other direction.

Per Denning L.J.: The admissibility of evidence in cases of advancement was to be governed by the same rules as in other civil actions and, accordingly, in order to ascertain a man's intention, evidence was admissible not only of his contemporaneous statements, which were part of the transaction, but also of any subsequent acts and conduct on his part which threw light on his intention.

Per Romer L.J.: The suggestion that such acts and conduct were admissible in evidence, it being a matter for the judge to decide whether any, and if so what, weight or value should be attributed to them, could not be accepted. The following categories of conduct were properly admissible in evidence for the purpose of ascertaining a father's intention in transferring property to a child, namely: first, evidence of acts both by the father and child if against interest, for such acts operated as admissions; secondly, acts so associated with the original transaction as, in effect, to form part of it (for example, the continued retention by the father, upon an uncommunicated purchase of property in his child's name, of the title deeds and of accrued and accruing rents subsequently paid by tenants); thirdly, acts tending to show a course of dealing as between parent and child.

Grey v. *Grey* (1677) 2 Swanst. 594; *Dyer* v. *Dyer* (1788) 2 Cox Eq.Cas. 92; *Sidmouth* v. *Sidmouth* (1840) 2 Beav. 447; *Crabb* v. *Crabb* (1834) 1 My. & K. 511; *Marshal* v. *Crutwell* (1875) L.R. 20 Eq. 328; and *Warren* v. *Gurney* [1944] 2 All E.R. 472, considered.

Decision of Harman J. [1953] 1 W.L.R. 460; [1953] 1 All E.R. 569, affirmed.

APPEAL from Harman J.

By his will, made in December, 1946, the testator, Philip Edward Shephard, bequeathed specifically a number of properties and left annuities amounting to £1,800 a year before bequeathing the residue to his children, Philip Edward Shephard (hereafter called Philip), Richard David Shephard (hereafter called Richard) and Winifred Maud Cartwright (hereafter called Winifred). In 1949 he died. At the time when he made his will he passed for a rich man. After his death, however, owing to the investigations of the defendant, Hedley Spain Dunk, a chartered accountant, who was appointed an executor, his estate was sworn for probate purposes at £94,000 gross with a net estate of nil, a result due to the claims of Richard and Winifred, the subject of the present action.

After certain abortive proceedings by the testator's executors, this action was started by Richard and Winifred claiming against the testator's executors, Hedley Spain Dunk and Joseph Osmond Cartwright, to be creditors of the estate. Harman J. made a general administration decree together with a number of special accounts and inquiries designed to investigate the plaintiffs' claims. Such of them as related to the plaintiffs, he treated as having been adjourned to him before certificate under the usual power for that purpose. His Lordship also directed that the decree be served on the third son, Philip, who attended the hearing by counsel in opposition to the plaintiffs.

The claims made were similar. They rested on what was called "the presumption of advancement" existing between a father and his children, and were said to arise out of gifts made to each child in 1929, or thereabouts, the making of which had been disclosed only by a recent search through the testator's books and papers after his death. Against the alleged gifts each plaintiff was willing to bring into account certain moneys or shares placed in his or her name from time to time by the testator, so that each claim was for the balance of a running account.

The presumption of advancement, the plaintiffs alleged, arose in the following circumstances:—the testator had before 1929 an insurance business registered under the Registration of Business Names Act, 1916, in the name of "R. D. & P. E. Shephard." Those were the names of two of his children: Philip, born in 1901, and Richard (one of the plaintiffs), born in 1913. Also registered as a partner was his daughter Winifred, the other plaintiff, born in 1906. The testator also started before 1929 two other businesses, one called Townsend & Page, which stood in Winifred's name, and a furnishing business registered as the property of Richard and one Grimes, which was subsequently converted into a limited company. Thus, the testator had long used his children's names to help his own business activities, about which Richard and Winifred were not consulted and knew nothing.

In 1918 the testator's first wife died, and in 1919 he married his second wife, by whom he had no issue, and who was still living at the date of these proceedings.

In 1929 the testator went into the business of speculative building with one Leo Mayer. They promoted five small private companies, each having a capital of about £1,000, which the two promoters divided between themselves and their families. The testator caused the greater part of the shares to which he was entitled in these companies to be allotted in varying proportions to his three children. Philip, the eldest son, was by this time of age and helped his father in business; Winifred was of age, and Richard, an infant, had just left school and was employed in the building business. Neither Winifred nor Richard knew anything about the allotments made in their names.

By 1934, the building venture had become highly successful, and the testator and Mayer promoted a public company to acquire their interests, called the Ideal Building and Land Development Co. Ld., which, by agreement dated May 16, 1934, agreed to acquire all the shares in the five private companies for £700,000, of which £300,000 was to be satisfied in cash and £400,000 in shares. Half the consideration went to each family, the result being that there was payable, as the price of shares standing in Winifred's name, £26,737 10s. cash and 40,000 shares of £1 each, and, as the price of those in Richard's name, £45,937 10s. cash and 40,000 like shares. Richard and Winifred signed that agreement, Richard also witnessing Mayer's signature; but in these proceedings, each of them denied knowing of its existence, saying that they were accustomed to signing documents for the testator and ready to sign anything that he put before them without inquiry. In connexion with that transaction, the testator procured each of the plaintiffs to sign a power of attorney covering the sale of the shares, and an authority to the public company to pay direct to the testator the cash proportion of their half of the purchase consideration. The powers of attorney were not used, but other documents were used to authorize the testator to receive from the new company £145,000, the total cash consideration, which he did on May 25, 1934. The remaining £5,000 in cash was payable in respect of shares registered in the name of his wife. On the same day the testator paid £157,000 through the Leadenhall Street branch of Barclays Bank to his current account at the Beckenham branch, and transferred £133,000 of that sum to a deposit account. On May 29, however, he re-transferred the money from the deposit account to his current account, and opened a deposit account in Winifred's name for £19,277 10s. and in Richard's name for £42,060 5s. It was pointed out that that credit to Richard's deposit account was short by £3,877 5s. of the £45,937 10s. expressed to be due under the agreement of May 16; this, it was suggested, might be explained by a cheque for that amount having been drawn on the previous day—May 28, 1934—in favour of "Shephard," the payee being unidentified, but not being Richard. Similarly, the amount paid to the credit of Winifred's deposit account was short by £7,460 10s. of the cash expressed to be due to her under the sale agreement, which was said to be accounted for by cheques amounting to that sum drawn by the testator in favour of two accounts at Lloyds Bank at Dartford, one of which was in Winifred's name and one in that of the business of Townsend & Page. Both accounts had been used for that business, and the payments only sufficed to clear off overdrafts and thus to close down the business.

Subsequently, the testator sold the share consideration passing to the children. Richard's shares were sold first for about £88,000, which was credited to his deposit account on June 15, 1934. Winifred's shares were sold in August at a lower price for just under £60,000, which was credited to her deposit account on August 2, 1934. At some time, after the deposit accounts were created, and before 1935, the testator procured from each of the two plaintiffs a further authority requesting the bank to honour the testator's signature for withdrawals from the deposit accounts. By those means, the whole of the sums to the credit of the deposit accounts were withdrawn by the end of 1935 and employed by the testator for his own purposes. It was out of those transactions that the claims arose.

In 1935 the testator promoted a new private company called "Philip Edward Shephard Estates Ld.," of which he had sole control, and most of the money withdrawn from the plaintiffs' deposit accounts went to buy real or leasehold property in that company's name. The testator, in 1935 and 1936, caused to be made in that company's books entries showing Winifred a creditor to the extent of some £50,000 on loan account, in which position she remained vis-à-vis the company: and in these proceedings she offered to give credit for that sum against her claims. Similarly, Richard was credited between 1935 and 1939 with rather over £47,000 against the estates company, and he was willing to bring that amount into account. His case, however, was further complicated, notably by dealings in the shares of a company called "Woodside Park Garden Suburb Ld." In March, 1935, about £47,000 was drawn from Richard's deposit account and credited to Philip, who used the money to buy 880 shares in that company at £45 a share. Those were first held in Philip's name apparently as the testator's nominee; of them, 580 were subsequently transferred by Philip to the testator and 300 were transferred gratuitously to Richard, representing a cost of £13,500, which he offered in these proceedings to bring into account. In addition, each claimant offered to bring into account £250, the price of shares of that nominal amount in the estates company, the whole of the capital in which, amounting to £1,000, was paid for, in effect, out of moneys standing to the credit of Winifred's deposit account. The remaining shares were registered as to 250 in Philip's name, as to 200 in the testator's name and as to 50 in that of his wife. £20,000 drawn out of Richard's deposit account in March, 1935, was deposited by the testator with the Eastbourne Mutual Building Society in four sums of £5,000, one in his own name and one in the name of each child, including Philip. These three latter sums were repaid in 1936 and credited to the children in their accounts with the estates company. £750 out of Richard's deposit account was used to buy shares in his name in the furnishing business earlier mentioned, which had been incorporated. That venture was a failure. Finally, £430 was paid to Richard himself in connexion with a small business in which the testator had set him up.

The resulting claim of Winifred was something over £36,000. That involved treating the original allotments of the shares in the private companies as advancements and showing the testator as discharging himself, except for the sums used for Townsend & Page, by the creation of her deposit account. Thereafter, appropriations out of the deposit account were debited to the testator who, on the other hand, was credited with the loan account created with the estates company and with the 250 estates company shares.

Richard's claim, based on similar lines, amounted to over £72,000, and the two claims more than sufficed to exhaust the estate, with the result that the plaintiffs would divide it between them to the detriment of the annuitants and of their elder brother Philip, and the Crown would take nothing by way of estate duty.

It appeared from the evidence given at the hearing that the testator from time to time had purchased houses in the name of each child and that, at any rate from the time when the child was 21, he or she was informed of those purchases and told that they were gifts.

The inquiries directed in the order for general administration are fully set out in the judgment of Evershed M.R.

Harman J. dismissed the action.

The plaintiffs appealed.

B. L. Bathurst Q.C. and *Victor Coen* for the plaintiffs. If the original allotment of shares in 1929 was a gift to the plaintiffs, the rest of their claim logically follows. The relationship of parent and child displaces the presumption of a resulting trust, which arises where shares are placed in a third party's name without consideration. There is no direct evidence as to the intention of the testator. A prima facie intention to make a gift is shown by his putting the shares in the names of the children. The pattern of the transaction also points in the same direction for, if the testator had intended to create a trust, it is unlikely that he would have advanced different amounts to different members of his family: see *Fowkes* v. *Pascoe.*[1] Nor is it easy to see why the testator should have put property in the name of the infant Richard, if a trust was intended. If the transaction was a device to increase the testator's control of the company, it would have been better achieved by putting the shares in the name of a nominee. So far as the subsequent acts and declarations of the testator are admissible, they point in favour of the plaintiffs' contention. The indications that in the testator's eyes these shares were his children's property are as follows: his dealings with the one dividend received and with the proceeds of sale of the shares which he credited with substantial accuracy to their respective accounts; the significant difference between the arrangements made in the agreement of 1934 for the Mayer family and the testator's. The income tax returns of 1936 are only consistent with a gift having been made; and *Gascoigne* v. *Gascoigne*[2] shows that, if a transaction is capable of an honest explanation, the court will prefer that explanation to one which is dishonest or which is concerned to defraud the Inland Revenue. The defendants cannot be heard to say that the testator was

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[1] (1875) L.R. 10 Ch. 345n.

[2] [1918] 1 K.B. 223; 34 T.L.R. 168.

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intending to avoid paying either income tax or death duties: see *Hepworth* v. *Hepworth.*[3]

Evidence of conduct subsequent to the gift is admissible in support of the plaintiffs' claim. Acts or declarations of either donor or donee subsequent to the alleged gift are admissible if made against their respective interests. The subsequent acts or declarations of the donor are not, however, admissible for the purpose of rebutting the presumption of advancement (see Underhill on Trusts, 10th ed., p. 186, *Crabb* v. *Crabb*[4] being cited), and for that purpose there is no real distinction between acts and declaration: *Warren* v. *Gurney.*[5] If the testator was alive now, he could give evidence as to his intentions, because he could be cross-examined, and the question would merely have been as to how much weight should be attached to his allegations, bearing in mind that they might be coloured by a change of intentions since the original transaction was made. Subsequent acts or declarations of the donor might be admissible in order to see, not what he did, but whether the donee had acquiesced in what the donor did after the original gift was made. Similarly, the subsequent acts or declarations of the plaintiffs themselves would be admissible to disprove the existence of the original gift, since that evidence would be against their interest. The plaintiffs, however, did not know what they were doing when they executed the various documents, which enabled the testator to deal with these shares and the proceeds of sale. Accordingly, the documents cannot indicate either that the transactions of 1929 were not absolute gifts, nor that the plaintiffs intended to repudiate the gifts: *Christy* v. *Courtenay*[6]; *Ex parte Cooper.*[7] Further, the defendants would have had to prove that the infant donee, Richard, had been independently advised. The documents which the plaintiffs signed enabled the father to deal with what was the children's money, but only as a trustee: *Soar* v. *Ashwell.*[8] [Reference was also made to *Grey* v. *Grey*[9]; *Dyer* v. *Dyer*[10]; *Finch* v. *Finch*[11]; *Sidmouth* v. *Sidmouth*[12]; *Bone* v. *Pollard,*[13] and *Jeans* v. *Cooke.*[14]] *Marshal* v. *Crutwell*[15] is distinguishable on the facts, which were strongly against there being a gift.

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[3] (1870) L.R. 11 Eq. 10.
[4] (1834) 1 My. & K. 511.
[5] [1944] 2 All E.R. 472.
[6] (1849) 13 Beav. 96.
[7] (1882) 26 S.J. 530.
[8] [1893] 2 Q.B. 390.
[9] (1677) 2 Swanst. 594.
[10] (1788) 2 Cox Eq.Cas. 92.
[11] (1808) 15 Ves. 43, 50.
[12] (1840) 2 Beav. 447, 453.
[13] (1857) 24 Beav. 283.
[14] (1857) 24 Beav. 513.
[15] (1875) L.R. 20 Eq. 328, 329.

[DENNING L.J. In that case subsequent events were considered, but if the plaintiffs' submission here is correct that evidence was inadmissible.]

Marshal v. *Crutwell*[15] is explained in *In re Harrison.*[16] That was a case of husband and wife, and the question was whether each sum paid into a joint account by a man in failing health for the purpose of paying for the housekeeping expenses was intended as a gift or not. Each payment into the account had to be looked at independently as a separate transaction. The case is therefore distinguishable. *Young* v. *Sealey*[17] is not relevant. In *Devoy* v. *Devoy*[18] the father was alive. He could, therefore, give evidence as to his intention at the time of the transaction, but, if he had died, it is submitted that that evidence would have been inadmissible, for it could not then have been tested by cross-examination.

Sir Lynn Ungoed-Thomas Q.C. and *F. B. Alcock* for Philip, the party attending. The onus is on the plaintiffs to establish that the original transaction of 1929 was an absolute gift to them, but on the vital question of the testator's intention at the time of the alleged gift the evidence does not support their contention. There were obvious reasons for putting the shares in the children's names, for at that time the testator was precluded by the terms of his then employment from engaging in the business which he was developing. He did not tell the children what he was doing, though presumably he would have done so if he had intended to make them a gift. He informed them, when he purchased house property for them, that he intended the property to be a gift, and the fact that he did not do so in 1929 is significant. Nor did the children seek to exercise any rights over the subject-matter of the alleged gift; the testator retained control even of the original shares and the children, apparently, never had the share certificates. The shares were divided unequally between the children —there was no pattern which might have suggested that these were advancements. The testator was developing his business and it is most unlikely that he would have parted with the majority holding when starting this new venture. He intended to retain control, and the children co-operated by signing the appropriate documents.

Even if it is held, contrary to our submission, that this was a gift, and even if the sums given in 1929 were advancements when they were made, the plaintiffs cannot succeed because of the documents which they subsequently signed. The dealings by the testator were in accordance with clear authorities and the testator was not accountable to them as trustee. The only cause of action must, therefore, be a common law action for debt or for money had and received. To that claim the Limitation Act, 1939, affords an answer. Even Richard's claim is statute-barred, for, although he was admittedly an infant when he signed the authorities, the transaction was binding on him, because looking at it as a whole it was for his benefit. It furthered the fortunes of the family of which he was a member. Even if the authorities he gave were voidable by Richard, he would have had to repudiate them within a reasonable period after attaining his majority. So far from having done that, he seems, having regard to the income tax return of 1936, rather to have ratified. Unless, therefore, there was concealed fraud, which, having regard to the facts and particularly to the income tax return of 1936, seems unlikely, time ran against him at the latest since he attained his majority and, consequently, his claim is barred.

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[15] (1875) L.R. 20 Eq. 328, 329.

[16] (1920) 90 L.J.Ch. 186.

[17] [1949] Ch. 278; [1949] 1 All E.R. 92.

[18] (1857) 3 Sm. & G. 403.

Even if that obstacle be overcome the plaintiffs cannot succeed unless they establish (and the onus of proof is on them) that the process by which the father obtained the money from their deposit accounts for his own use was fraudulent, for there is no question here of non est factum: *Hunter* v. *Walters*.[19]

The plaintiffs have relied on a presumption of advancement as indicating that the original transaction of 1929 was a gift, but that presumption is an inappropriate foundation for an allegation of fraud—they must prove the gift positively. It is further submitted that there is no presumption of advancement. Advancement is rather a circumstance of evidence: White and Tudor's Leading Cases, 9th ed., Vol. 2, p. 749; *Dyer* v. *Dyer*.[20] Advancement only arises where there is no other explanation of the evidence. If there is no other evidence, the court has to decide what inference should be drawn from all the facts. Admittedly, since the donees were children of the donor, there would be no presumption of resulting trust. The evidence of the testator's dealings after 1929 must be brought in to explain the original transaction of 1929, for it is submitted that the story was, from an evidential point of view, incomplete in 1929.

Evidence of the testator's dealings with the shares and their proceeds of sale after 1929 is admissible. The true effect of those transactions can only be ascertained from a consideration of all the facts, including the nature and extent of the testator's business activities and the relationship subsisting between him and the children. No question arises here as to the admissibility of subsequent declarations made by the testator, but, whether such declarations would be admissible or not, evidence of subsequent acts is admissible. This appears from the decision in *Marshal* v. *Crutwell*.[21] It may be that in a case of this character, all the acts of the alleged donor subsequent to the gift would not be admissible in evidence, but in this case the testator's conduct subsequent to 1929 is admissible in evidence, since it is part of the res gestae and shows his method of dealing with these shares and the proceeds of sale. That conduct is admissible as showing what was his intention in putting the shares into the names of the children in 1929.

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[19] (1871) L.R. 7 Ch. 75.

[20] 2 Cox Eq.Cas. 92.

Reliance is placed on the following facts as showing that no gift of the shares was ever intended by the testator: first, he never told the children that he had had the shares allotted to him; secondly, he paid the proceeds of sale into his own account; thirdly, when he subsequently paid the proceeds of sale into accounts in the names of the children, he did so on the advice of his accountant and immediately obtained authorities from the children enabling him to withdraw the moneys he had paid in; fourthly, his dealing with those moneys in connexion with Philip Edward Shephard Estates Ld. was inconsistent with the children having indefeasibly vested interests in the proceeds of sale of the original shares.

The plaintiffs claim, in effect, to be creditors of the testator's estate. Such a claim is barred by section 2 of the Limitation Act, 1939. This is a claim for money had and received to the use of the plaintiffs. The claim in respect of moneys withdrawn from their respective banking accounts is now statute-barred.

Bathurst Q.C., on the effect of the authorities given by the children to draw on their banking accounts, it being assumed for the purposes of the argument that the transactions of 1929 constituted advancements. The authorities which the children gave to the testator either operated as gifts of the funds in the bank to the testator or made him the commercial or fiduciary agent of the children. There is no evidence of gift. The true view is that the father was the fiduciary agent of the children. He would remain a trustee until he had accounted for the moneys he drew out from the banking accounts: *Soar* v. *Ashwell* [22]; *Lyell* v. *Kennedy.*[23] In section 31 (1) of the Limitation Act, 1939, "trustee" is defined by reference to the definition of trustee in section 68 of the Trustee Act, 1925. There is no distinction between an express and a constructive trustee: *In re Eyre-Williams.*[24] The testator was a trustee of the moneys which he withdrew from the accounts. The position would be different if the testator had been constituted a commercial agent: *Henry* v. *Hammond* [25]; but, since he was at all material times a trustee, time never ran in his favour and accordingly Winifred is entitled under section 19 (1) (*b*) of the Act of 1939 to trace the moneys drawn out of her account. [Reference was made to *Wright* v. *Vanderplank* [26] and *Beaman* v. *A.R.T.S. Ld.*[27]] Another possible view is that when the testator drew the moneys out of the accounts, in the absence of any evidence of gift, he held such moneys on a resulting trust for the children, the principle of *Dyer* v. *Dyer* [28] applying.

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[21] L.R. 20 Eq. 328.

The whole evidence in this case suggests that the testator, in receiving the moneys from the children's banking account, was doing so in the capacity of a trustee for them and that they were not lending him those moneys: *Hatch* v. *Hatch.*[29] The position of Richard is still stronger, since he was at all relevant times an infant. The testator, who was his guardian, must have been a trustee of the moneys he took out of Richard's account, and he could only have discharged himself by accounting for such moneys to Richard, who did not become a mere creditor of the testator. The children have a claim in rem and can claim to trace the moneys taken from their several accounts into the investments which the testator purchased with such moneys. [Reference was made to *Burdick* v. *Garrick* [30] and *In re Diplock.*[31]]

Sir Lynn Ungoed-Thomas Q.C., in reply. The principle of tracing applied; *In re Diplock* [31] has no application to this case. For that doctrine to apply there must be a property nexus. Here there is no such nexus. This is a case of creditor and debtor. That relationship cannot impose a trust: see the observations of Lord Esher M.R. in *Soar* v. *Ashwell.*[32] Here the plaintiffs are suing as creditors. They have not established that the testator held these moneys as trustee. The defendants rely on *Henry* v.

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[22] [1893] 2 Q.B. 390.

[23] (1889) 14 App.Cas. 437.

[24] [1923] 2 Ch. 533.

[25] [1913] 2 K.B. 515.

[26] (1856) 8 De G.M. & G. 133.

[27] [1949] 1 K.B. 550; 65 T.L.R. 389; [1949] 1 All E.R. 465.

[28] 2 Cox Eq.Cas. 92.

[29] (1804) 9 Ves. 292.

[30] (1870) L.R. 5 Ch. 233.

[31] [1948] Ch. 465; [1948] 2 All E.R. 318.

[32] [1893] 2 Q.B. 390, 393, 394.

Hammond.[33] In *Beaman* v. *A.R.T.S. Ld.*[34] there was concealment by the defendants of what they had done. Here the children took the benefit of the various transactions into which the testator entered and they are not now entitled to pick those transactions to pieces and object to those parts which were not for their benefit. Those transactions should be regarded as a whole. They were undertaken for the benefit of the testator's whole family and the plaintiffs cannot now take exception to certain of them.

Arthur de W. Mulligan, for the executors, adopted the argument on behalf of Philip opposing the plaintiffs' claim. There was here no valid gift by the testator. To constitute a valid gift there must be acceptance by the donee. The principle of *Cochrane* v. *Moore* [35] is not limited to gifts of chattels. Here the children say that they had no knowledge of the transaction of 1929; accordingly, they can never have accepted the provision thereby made for them, even if the testator then intended to make a gift. An offer cannot be accepted after the death of the offeror. [Reference was made to *Jones* v. *Lock.*[36]]

Cur. adv. vult.

July 1. Their Lordships read the following judgments:—

EVERSHED M.R. The questions which the court is called upon to determine on this appeal are those asked by the three inquiries numbered 5, 7 and 10 in the order for general administration made in this action on January 12, 1953. They are questions of great complexity and difficulty, and I find it, therefore, useful to set out at the beginning of my judgment the three inquiries. They are: "5. An inquiry whether any and which of the children of "the testator derived or received from the testator in his lifetime "any and what sums of money or other estates or property in the "nature of advancements." "7. An inquiry whether the plaintiff Richard David Shephard is entitled to a first charge or any "charge on 580 shares of £1 each in Woodside Park Garden "Suburb Ld. standing in the testator's name at the date of his "death to secure the sum of £23,960 8s. 9d. or some other and "what sum." "10. An inquiry whether subject to what may be "found upon the inquiry numbered 14 the plaintiff Winifred Maud "Cartwright is entitled to all or any and if so which of the 450 "shares of £1 each in Philip Edward Shepherd Estates Ltd., "registered in the name of the testator at his death."

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[33] [1913] 2 K.B. 515.

[34] [1949] 1 K.B. 550.

[35] (1890) 25 Q.B.D. 57.

[36] (1865) L.R. 1 Ch. 25.

As will later appear, the inquiries numbered 7 and 10 are relatively of a subsidiary character. The main debate has been upon the first inquiry numbered 5 in relation to the two plaintiffs in the action, for their older brother, the party attending these proceedings, has made no claim in this action, though there are in fact circumstances available to him comparable to those upon which the plaintiffs relied. But, in my judgment, the real question involved in the appeal is, in truth, distinct from inquiry No. 5 and is not necessarily solved by an answer to it.

The order of January 12, 1953, was an order for general administration. The history of the litigation has not been uneventful—it was the subject of comment in the opening paragraphs of the judgment of Harman J., but it is essential to bear in mind that the writ in the present proceedings was issued on June 19, 1951, and that the two plaintiffs, Richard and Winifred, thereby claimed to be entitled as creditors of the estate of the testator, Philip Edward Shephard, who was their father, for very large sums of money, together far more than sufficient to exhaust entirely the assets in the hands of the executors. Harman J., therefore, having ordered amendment of the proceedings so as to entitle them "In the Matter of the Testator's "Estate," made the order I have mentioned in the form appropriate to a creditor's administration suit and thereafter proceeded to deal, inter alia, with the three inquiries, as though they had been adjourned direct to him in open court before certificate.

I have mentioned these matters before referring to any detail because it is, in my judgment, necessary to state and to emphasize that the plaintiffs in the action claim as creditors (between them for the sum of over £100,000, the claim of Richard being approximately double that of Winifred) of their father's estate. They say that their father's estate owes to them this large sum of money; and, so asserting, it is plain that the onus lies heavily upon them to prove their case.

How, then, do they claim that the debt arises? They answer: out of certain dealings or transactions in the years 1934 and 1935. The testator died in 1949, and there is no question but that the claims were made for the first time after his death. Prima facie, therefore, the Limitation Act, 1939, must, in any event, provide a complete answer to any common law claim in debt or for money had and received. But it is the case of the plaintiffs that the dealings in 1934 and 1935 were dealings by the testator with moneys which, because they were the proceeds of absolute and unconditional gifts previously made to the plaintiffs by the testator himself, were, to the testator's knowledge, the plaintiffs' moneys, and for the use of, or dealings with which, the plaintiffs had given to the testator no, or no valid, authority. If this allegation is well founded, then the Limitation Act, 1939, is not available to the executors. The testator must be regarded on this basis as a trustee to whose hands trust moneys will have come. The plaintiffs were even prepared to contend, if necessary, that the testator must be held to have acted in concealed fraud of the plaintiffs and so to have deprived himself and his estate of any defence under the Limitation Act, 1939. For this purpose they relied on the case of *Beaman* v. *A.R.T.S. Ld.*[1] As the plaintiffs in their evidence stated that their father was a man of scrupulous honour, I propose to say no more upon this last contention than to hold that, on the facts of the case, it is, in my opinion, insupportable.

It is clear, from what I have said, that it is an essential foundation to their claim for the plaintiffs to prove the gifts to which I have referred. For, unless such gifts are established, then the subject-matter of the testator's dealings in 1934 and 1935 was not the plaintiffs' property at all, and their claim fails in limine. The significance of the fifth inquiry directed by the judge thus appears. It is also made apparent in what respect the present case differs so greatly (as the judge observed) from the more usual case where the question, aye or no, of an advancement by a parent to a child falls to be determined. In the more usual case, the question arises whether some item of property found to be legally vested in a child is beneficially the child's own property. In this case the subject of the alleged gifts, namely, shares in certain private companies, was undoubtedly so vested originally—in, or shortly after, the year 1929; but it was so vested in circumstances and on conditions such that the testator was always able to exercise (as he did) unlimited control over the disposition of the shares, and also over the whole of their proceeds of sale in 1934 (which proceeds in May of that year were placed to the credit of deposit accounts with Barclays Bank Ld. in the plaintiffs' respective names). This control was exercised in various ways by the testator for the benefit of his family, including himself; and, in so far as certain of the proceeds of sale were ultimately utilized by the testator in creating benefits of a different character for the two plaintiffs, they have been prepared to give credit accordingly, on the footing that, to that extent, the testator has been able to discharge himself from the obligation which (they say) rested upon him to account to them strictly for the whole of the original proceeds. It is part of the plaintiffs' case that they never knew anything whatever about the existence of the property, that is, the shares in the private companies, or about the vesting of it in their names or the placing in their names upon deposit account of the proceeds of the realization of the shares until one or other of the defendants told them about these matters after the testator's death. This ignorance is indeed remarkable, for each of the plaintiffs signed powers of attorney and other documents in relation to the shares alleged to have been given to them and in relation to their proceeds of realization, including directions to Barclays Bank Ld. to honour cheques drawn by the testator on their respective deposit accounts to the credit of which there was at one time, as they say quite unknown to them, over £200,000. The directions or authorities to the bank are short and simple documents. It is plainly understandable that their execution might have been forgotten after a period of nearly 20 years, but it is not easy to comprehend how any reasonably intelligent or educated human being could have executed such documents without becoming aware of their nature; and neither plaintiff has denied execution or raised a plea of non est factum in regard to any of the documents which he or she executed. I assume, however, that the judge accepted the testimony of the plaintiffs that they were in fact at all times wholly ignorant of the character of the documents which they were content to sign without observation or inquiry, though I observe that he described their respective affidavits as "very uncandid documents."

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[1] [1949] 1 K.B. 550; 65 T.L.R. 389; [1949] 1 All E.R. 465.

It may therefore be that the judge was right in his view that once the gifts were proved, everything else followed in the plaintiffs' favour—if the judge meant thereby gifts absolute and unqualified. It is the fact that when Richard executed the various documents put before him by his father he was but 20 years old, though he was of full age when the bank acted on the authority which Richard had executed (upon the evidence, without any further reference to him) and permitted his father to withdraw large sums, on one occasion over £70,000, from Richard's account. If those sums withdrawn were, in the eyes of the law, trust moneys in the testator's hands, it is not easy to see how, in the circumstances and on the facts which I think Harman J. found, the testator ever discharged himself in respect of them. The second plaintiff Winifred is, however, to my mind, in much greater difficulty. She was of full age when she signed the authority to the bank, and the bank in fact acted on that authority from time to time by using the moneys to the credit of her account in or towards the discharge of the testator's overdrawings on his own account, the sums so used being relatively small in amount, that is, round figures of £1,000 and £2,000 at a time. Substantially the whole amount originally standing to the credit of the second plaintiff's account was so used over a period of about 12 months from January, 1935. In her case, therefore, I am not for myself satisfied that the second plaintiff could, whatever may be the proper answer to inquiry No. 5, successfully establish that any of the moneys withdrawn from her account became trust moneys in the testator's hands, or that she could otherwise deprive the testator's estate of the benefit of the Limitation Act, 1939, as a defence to her claim upon his executors to account.

But these questions only arise if, in the first instance, absolute and unqualified gifts are established. The judge upon this issue —the issue directly raised by inquiry No. 5—found against the plaintiffs. My brethren, whose judgments I have had the advantage of reading in advance, are also both of opinion that the plaintiffs fail upon this essential issue. I agree with them that the plaintiffs have failed to establish such absolute and unqualified gifts as are essential to their case; but, since I have perhaps reached the same conclusion by a slightly different route, I have thought it proper to attempt an explanation of my own reasons. In particular, I have thought it of great importance to a proper apprehension of the plaintiff's claim to state the matters which I have set out above. In the first place, and having regard to those facts, the onus of proof, in my judgment, rests, as I have already indicated, heavily upon the plaintiffs to establish the making of absolute and unqualified gifts by their father to them and so to establish the further and essential proposition that the several sums drawn out from their deposit accounts and used by or for the benefit of the testator and his family were trust moneys in his hands. There is a second reason, in my judgment, for the significance of the matters I have stated, which is consequential on the first, and may be an expansion of it or a different way of stating it. Where the question of advancement arises in respect of an item of property found in the name of a child— and in the more usual case after the parent's death—then the question is relatively straightforward, namely, whether, on all the facts of the case, the property is held subject to a resulting trust in the parent's favour, or whether the child is, at the time when the proceeding is brought, beneficially entitled to the property;

and, in the latter event, it is irrelevant if, during the parent's life, he or she may have received and made use of the income of the property, to determine the exact circumstances and the precise qualifications which must be treated as having attached to the original vesting of the property and as having justified such use on the parent's part; for, in none of the many cases which have been cited to us, has any claim been made by the child to recover, as a creditor from the parent's estate, the equivalent of any such interest which the parent may have received; and as my brother Denning observes in his judgment, there is strong authority for the view that such a claim would not be lightly entertained. It seems, then, to follow that the vesting by way of advancement of property in the name of a child may not be inconsistent, at any rate, with the retention by the parent of a right to receive and enjoy the interest on the property during his own life. In the present case, it is not sufficient for the plaintiffs to prove an intention on the testator's part to make to them advancements to operate in some way at some time and subject to some powers of control or revocation. They must show that, notwithstanding the steps that were taken at the time when the various acts were done, which are relied upon as constituting or recognizing advancements, but which effectively preserved (as they were obviously intended to do) complete liberty of action to the testator to deal with the subject-matter "advanced" during his lifetime, the testator must be treated as having made to each of the plaintiffs absolute and unqualified gifts operating immediately. It is to be noted that, if the plaintiffs are right in so claiming (as they must be to succeed at all), then equally they should be entitled to claim against the testator's estate an account of all income or interest received by him attributable to the property in question or its proceeds. In my judgment, it is this full but essential claim that the plaintiffs have failed to establish.

The conclusion of the judge, after he had carefully considered all the material before him, was as follows [2]: "Considering the "evidence as a whole, and doing my best to weigh the circum-"stances on both sides, I feel obliged to come to the conclusion "that the testator did not in the earlier allotments of shares "any more than in the transactions with the businesses intend "to commit himself irrevocably by way of out-and-out gifts."

If, by that observation, the judge meant no more than to hold

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[2] [1953] 1 W.L.R. 460, 473; [1953] 1 All E.R. 569.

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that the plaintiffs had not established any absolute and unconditional gifts, I respectfully agree entirely with him. But he proceeded to answer the fifth inquiry in the negative, and I am unable to accept (as I do not think the judge accepted) the inference from that answer that there was never any advancement (in the sense of any intention to benefit the two plaintiffs) at all. The judge, in the earlier part of his judgment, so fully recited all the facts and all the evidence before him, that I find it unnecessary to repeat in detail those matters. The story, and the figures involved, are highly complex, and save in two relatively minor matters, the plaintiffs have not quarrelled with the judge's recitals. It is, however, important to notice that the gifts alleged were made in, or shortly after, the year 1929 and consisted of the placing in the names of the two plaintiffs (and also in the names of the testator's wife and his elder son, Philip, the party attending these proceedings) certain shares in five private companies which he formed about that time. The formation of those companies appears to have been the testator's first excursion into the business of building and property owning, and Mr. Bathurst for the plaintiffs in this court naturally and forcibly relied upon what he called the pattern which the distribution of the shares presents. The case is not one where a father has put a few shares into the names of his wife or children to qualify them as directors or to increase the numbers of his supporters at a general meeting. Thus, whereas the number of shares which he himself held in all the companies amounted together to 725, those put in the name of the first plaintiff amounted to 875, and those put in the name of the second plaintiff to 425—the larger number put in the name of the former being attributable to his large holding (450 out of 750 together held by the testator's family) in one particular company which carried on a road-making business, the type of business in which the first plaintiff was himself actually employed. On the other hand, as the judge found, neither of the plaintiffs knew anything about the formation of these companies or, at least, of their alleged interest in them. No certificates or documents of title to the shares ever appear to have been issued to the plaintiffs or, indeed, issued at all. It seems clear that the testator, together with his associate Mr. Mayer, who, and whose family, held equivalent amounts of shares in these companies, completely controlled their operations. By what means, if at all, any voting rights attaching to any of the shares held by members of the testator's family, other than himself, were ever exercised does not appear. There is no evidence that any single piece of paper relating to their holdings ever reached the hands of the plaintiffs or either of them, and, as regards the conclusion which Mr. Bathurst sought to draw from the so-called "pattern" of the shareholding, there must be set the circumstance that, as regards the Mayer holdings, which were similarly distributed, the evidence showed that the shares placed in the names of members of Mr. Mayer's family, other than himself, were placed in their names as nominees for Mr. Mayer. But whatever might have been the proper inference to be drawn from the very limited circumstances known about the formation of these five companies and the placing of their shares in the plaintiffs' names, the matter is, in my judgment, carried appreciably further in the plaintiffs' favour by the events of 1934. I venture, however, to emphasize again that the only gifts alleged were those of the shares themselves by the placing of them in the plaintiffs' names. It has never been suggested that any further or independent gift was made in 1934. The events of 1934 are relied upon by the plaintiffs solely as evidence of a recognition or affirmation by the testator of the gifts previously made.

What I have called "the 1934 events" consist broadly of two separate matters: First, the fact that in the case of one of the five companies a dividend was declared in respect of the shares, being the only dividend ever declared by any of the companies prior to the sale of the shares presently mentioned. The full amount of the dividend attributable to the shares held by the testator and his three children (for there were no shares in his wife's name in this company) was received by the testator and used by him to discharge a debt due by him to that company, and neither of the plaintiffs ever knew anything about such dividend till after the testator's death. At a later date, however, in 1936, the testator instructed the defendant Dunk, who acted as his accountant, to state in answer to an inquiry made by the Inland Revenue, that the two plaintiffs (and their brother, Philip, the party attending) were beneficially interested in so much of the dividend as related to the shares in their respective names. But more significant was the second matter which occurred in 1934, namely, the sale which the testator and Mr. Mayer negotiated of all the shares in all five companies to a public company for a very large consideration payable partly in cash and partly in shares. Again the plaintiffs say that they had no knowledge of this transaction whatever, in spite of the agreement presently mentioned. They executed powers of attorney and authorities to each of the five companies, which enabled the testator (with Mr. Mayer) to carry out the sale, and by these or other means the whole of the consideration attributable to the shares held by the testator or member or members of his family was received by the testator himself. For the purposes of the sale an agreement was entered into (which the plaintiffs, among others, duly, if submissively, executed) and that agreement contained the significant recital that the shares held by members of Mr. Mayer's family, other than himself, were held by them as nominees for Mr. Mayer, there being no corresponding recital in regard to the shares held by members of the testator's family, other than the testator. Further (and perhaps most significant of all), the testator appears, following a conversation with Mr. Dunk, to have placed to the credit of the plaintiffs respectively with Barclays Bank Ld. the exact amounts expressed in shillings and pence, after allowing for certain other payments which can be identified and regarded as paid on behalf of the respective plaintiffs, of the total cash consideration attributable to the two plaintiffs' shares and also the approximate equivalent of the proceeds of the share consideration similarly so attributable. The testator similarly dealt with the cash and share consideration attributable to the shares held by the party attending, the plaintiffs' brother, Philip, and also the consideration attributable to the shares held by the testator's wife. As regards the testator's wife, it is one of the two matters in which the judge appears to have been in error, in that he said that the testator's wife never received the consideration due to her, namely, £5,000 in cash. I mention it, in case it should have influenced the judge in reaching the conclusion that the various actings of the testator in 1934 were not sufficient to constitute a recognition or affirmation of previous gifts.

The judge took account of all these matters, but did not, as I understand him, regard them singly or in combination as of substantial significance. In my judgment, their combined effect, at least, is formidable and I have, for my part, found it impossible to deny that they constitute a recognition or affirmation of some gift or advancement in 1929. But it does not follow, in my view, that they are consistent only, as Mr. Bathurst would have it, with an absolute and unqualified gift of the corpus (at any rate) of the original shares. For the acts relied upon as constituting recognition of the previous gifts were accompanied by other acts which left (and must have been intended to have left) with the testator a control over the disposition of the proceeds of sale of the shares as complete and unlimited as he appears to have had over the shares themselves.

I have already observed that the cases provide illustrations of gifts to children of such character as do not appear to impose any liability on the parent to account for the income or interest received by him during his life. In the present case, the qualified character of the advancement is more far reaching, for it left with the testator a power of control, if necessary a power of revocation, a "dominion" over the subject-matter "advanced" (see *Devoy* v. *Devoy* [3]) which enabled him during his life to make such use thereof as he thought fit for the general benefit of his family, including himself. But I can see nothing repugnant or illogical in this result, which is not only consistent with his general conduct over a long period of time, but also seems natural enough to a father who might well not, and I think, as his will showed, did not, desire to produce substantial inequality between his children. Owing to what must be regarded as accidents, including the varying fortunes of the five companies and the times at which the testator sold the share considerations, the proceeds attributable to Richard's shares greatly exceeded those attributable to Winifred's. As Harman J. noted, the withdrawals from his children's deposit accounts were (apart from their application directly by the bank in reduction of his own overdrawings) substantially used or wanted by the testator for acquiring new properties for the property company which he formed known as Philip Edward Shephard Estates Ld., and the final result was that each of the plaintiffs was credited on loan account with that company with sums of more nearly equal amount.

I have referred to the fact that shares were originally placed also in the name of the eldest of the testator's three children, Philip the party attending, and that a deposit account was likewise opened in his name, which was also withdrawn by or used for the benefit of the testator and his family in the same way as the two deposit accounts of the plaintiffs. Philip makes no claim in this action. But it is clear (and there was no argument before us to the contrary) that no inference favourable or unfavourable to the plaintiffs can be drawn from the fact or from any distinction that might upon investigation be found between the treatment of Philip on the one hand and the plaintiffs on the other. Nor have I been able to derive assistance from the circumstance that other properties, in some cases businesses, in others real properties, were from time to time put into each of the plaintiffs' names, though Sir Lynn Ungoed-Thomas contended that there was an essential distinction between the vesting of real properties in the children's names on the one hand (which he conceded were gifts) and, on the other, the vesting of business properties, including shares (which he contended were not). It is true that for some business purposes the testator may have used the names of his children, because his own employment by the Royal Exchange Assurance disabled him from personally engaging in those businesses. In other cases, it is far from clear to me to what extent he may not have intended his children to be beneficially interested in the many business enterprises for which he was responsible. And, as regards the real properties which he acquired in the names of his children, though he did inform them of such purchases, he does not appear to have done so until some time after the actual dates, and then he told them (according, at any rate, to the second plaintiff) that such properties would "eventually become" theirs. In practice, he kept the entire management in his own hands and neither of the plaintiffs enjoyed during their father's life the income produced by the properties.

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[3] (1857) 3 Sm. & G. 403.

The result, in my judgment, is that though the plaintiffs establish "advancements" in the sense that the testator, when he put the shares in the five companies in their names, intended to confer benefits upon them, they fail to establish that the moneys withdrawn from their respective deposit accounts, which represented the proceeds of sale of the shares, were trust moneys in their father's hands or that the testator's estate is otherwise accountable to them for such moneys. And since, as I have said, the onus lies, and lies heavily, upon the plaintiffs, it is unnecessary for the executors to show, or for the court to find, what precisely were the terms or qualifications of the original "advancements." It is enough that any "advancements" which the plaintiffs can establish were not of such an absolute character that the testator's estate is now accountable for all sums withdrawn from the relevant deposit accounts.

This conclusion is sufficient to dispose of the appeal and makes it unnecessary to deal with the 7th and 10th inquiries, for the claim, which underlies each of those inquiries, is based on the ability to trace trust moneys into that which now represents them, and, if I am right so far, there never were any such trust moneys. In the case of Richard (Inquiry No. 7) the claim rests upon the circumstances that over £37,000, which was withdrawn from Richard's deposit account, was in fact so withdrawn for the purpose of acquiring 880 shares in Woodside Park Garden Suburb Ld. of which only 300 were afterwards put in Richard's name. But the case of Winifred (Inquiry No. 10) again is fraught with much greater difficulty, for I am by no means satisfied that, even if she were able to establish that the moneys standing to the credit of her deposit account were absolutely hers, she could further trace any of the sums withdrawn from that account (which were, as I have said, withdrawn by being from time to time transferred by the bank to the credit of the testator's own account) into shares in Philip Edward Shephard Estates Ld. Though I do not desire to attach much importance to the point, the peculiar difficulties with which Winifred is faced, on any view, may reflect legitimately, in my opinion, upon the claims generally of the two plaintiffs.

The question was discussed during the argument whether it is legitimate to take account of conduct on an alleged donor's part, subsequent to the date of the alleged gift, which tends to show that no gift was intended. It was not suggested that evidence is inadmissible of conduct of an alleged donor subsequent to the alleged gift which tends to show recognition or affirmation of the gift, and, in the present case, the testator's dealings with the one dividend received and in connection with the sale and the proceeds of sale of the shares were strongly relied upon by the plaintiffs to support their claim. It is, in my view, clear that, if regard is to be had to that evidence then, whatever be the answer to the general question, there cannot be excluded such parts of the story as tend in the other direction. If the testator's dealings in 1934 and 1935 are to be considered at all, then they must be considered in their entirety. It cannot be legitimate to pick out such parts of the whole narrative as support the plaintiffs' claim in isolation from their context.

It is therefore, in my judgment, in the present case unnecessary to answer the general question, and I prefer not to do so, particularly having regard to the authorities, including the authority of the textbooks, to which I later refer. In any given case the question will arise in regard to some particular matters of fact, and whether such matters of fact are, or are not, admissible in evidence will in practice be likely to depend on many circumstances, for example, whether they may also constitute admissions on the part of the donee, whether they are evidence of a continuing habit or practice of the alleged donor or whether (as in this case) they are intimately connected with other conduct of the donor, which is clearly admissible in evidence. I do not therefore desire to go further in this case than to decide what the circumstances of this case require to be decided.

Harman J. was of opinion that a distinction could properly be drawn between subsequent declarations and subsequent conduct or subsequent "events" tending in each case in the alleged donor's interest. I agree with him that, according to the general rules of evidence, the former, whether oral or written, could not, after the declarant's death, be given in evidence (apart from the Evidence Act, 1938); but that there is nothing in those general rules to exclude the latter, whatever might be their weight. Sir Lynn Ungoed-Thomas was also, as I understood him, disposed to agree that, however slight might, and frequently would be, its weight, evidence of relevant events, that is, of the alleged donor's conduct as distinct from declarations made by him orally or in writing, would always be admissible in proof of his intention at the earlier date of his alleged gift; and, in many of the cases, such evidence seems in fact to have been received, for example, by Lord Nottingham L.C. in *Grey* v. *Grey*.[4]

There is, however, authority the other way. In the two cases of *Sidmouth* v. *Sidmouth*,[5] and *Christy* v. *Courtenay*,[6] Lord Langdale M.R. expressed, more strongly in the first of them, the contrary view, and those cases have been treated as authority for the exclusion of evidence of subsequent conduct in the text-books. (See, for example, Underhill on Trusts, 10th ed., p. 187; Lewin on Trusts, 15th ed., pp. 148, 156, 157.) The exclusion of a subsequent will of the "donor" tending against the gift may, in any case, be justified, in so far as it constitutes an express or implied declaration. (See *Crabb* v. *Crabb*.[7]) But nice distinctions might arise between the terms of the will or deed as constituting a declaration on the one hand and the fact and character of the disposition on the other, upon which we have in the nature of the present case heard no argument. Finally, our attention was drawn to Morton L.J.'s observation in regard to subsequent declarations in *Warren* v. *Gurney*[8] where, after pointing out that subsequent declarations by the alleged donor were only admissible if against his interest, he said "if the rule "were otherwise it would be extremely easy for persons to "manufacture evidence," which, it was said, was no less applicable to subsequent conduct. No doubt a donor can, in a sense, "fabricate" conduct subsequent to a gift by him for the purpose of showing that no gift was intended. But the further argument, based on the circumstance that he cannot be cross-examined after his death, is at least less significant in regard to conduct.

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[4] (1677) 2 Swanst. 594.

[5] (1840) 2 Beav. 447.

[6] (1849) 13 Beav. 96, 99.

[7] (1834) 1 My. & K. 511, 519.

[8] [1944] 2 All E.R. 472, 473.

If the matter were free of authority, I should be disposed, as at present advised, to agree with Harman J. But, having regard to the authorities, I have mentioned, and since the general question does not require our decision in the present case, I prefer, as I have said, to express no opinion one way or the other upon it. I only add that in the somewhat analogous case, where the question was whether a testatrix had intended in her lifetime to make to another an out-and-out gift of a chattel or merely to promise to give it at some future time, the Court of Appeal recently in *In re Freeland, Jackson* v. *Rodgers*,[9] received and considered evidence of subsequent conduct of the alleged donor which tended to disprove the intention to give; but the authorities in regard to advancements were not cited to the court.

The conclusion of the whole matter is, in my judgment, that this appeal ought not to succeed.

DENNING L.J. Before us Sir Lynn Ungoed-Thomas took a preliminary point. He contended that, whether there was an advancement to the children or not, they had no claim to be creditors because their claims were statute barred.

In order to test this point, I propose to assume there was an advancement by the father to the children, not only of the original shares, but also of the money which he put into deposit accounts in their names. On that footing, the money was just as much theirs as if it had come to them, not from their father, but from another source, for instance, by deed of gift from an uncle, and put into their names at the bank. Suppose, then, that in such a case the father had got the children to sign documents authorizing him to draw on their banking account, what would be the legal result?

In considering this question, a distinction must be drawn between the two children, because the plaintiff Richard was under age at the time when he signed the authority, whereas the

[9] [1952] Ch. 110; [1951] 2 T.L.R. 1076; [1952] 1 All E.R. 16.

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daughter, the plaintiff Winifred, was not. But in regard to both of them, the judge has found that they had no inkling of the transactions. They signed whatever documents were put before them without any inquiry whatever. They remained throughout the testator's life ignorant of the original allotments, and of the said agreement, and of the deposit accounts.

So far as the plaintiff Richard is concerned, I think that the authority signed by him was absolutely void. It was, on the face of it, an authority to the bank authorizing them to honour the father's signature to withdrawals from Richard's deposit account. In other words, Richard authorized the testator to draw out his (Richard's) money. That is a transaction so manifestly prejudicial to Richard that the law regards it, not merely as voidable, but as void. It is very like the appointment by an infant of an agent, which has always been held void. It has been the law of this country for many centuries that an infant cannot appoint an agent to act for him, neither by means of a power of attorney, nor by any other means. If he purports to appoint an agent, not only is the appointment itself void, but everything done by the agent on behalf of the infant is also void and incapable of ratification. The reason for this rule is because an infant has not sufficient discretion to choose an agent to act for him. He is all too likely to choose the wrong man; and so the law, rather than have any argument upon the point, declares him to be incapable of choosing an agent at all. If he is to enter into any legal transaction, he must enter into it by himself and not by an agent, and then the law will look into the transaction and see whether it is binding on him or not. This distinction—between a transaction entered into by the infant himself and one entered into by an agent on his behalf—is taken in all the books. It is taken by Lord Mansfield L.C. himself in the leading case of *Zouch* v. *Parsons*,[10] where he says that the powers of attorney given by infants are void; and also all deeds by an infant which "delegate a mere "power and convey no interest." The same distinction is taken by Baron Parke in *Doe* d. *Thomas* v. *Roberts*,[11] where he said: "An infant cannot appoint an agent . . . an agreement by an "agent cannot bind an infant."

Applying these principles, it seems that the power of attorney given by Richard to his father, the testator, on May 2, 1934, was void; so also the authority dated May 14, 1934, by which he authorized the purchasing company to hand over the money and shares to the testator on his behalf, and in addition the undated authority by which he authorized his father to withdraw money from his deposit account; because he was at all those times under age. None of those documents conveyed any legal interest. They only authorized other people to affect the legal interest of the infant. As such they were absolutely void. On the assumption that there was initially an advancement, the money subsequently received by the father by virtue of the void authority was money had and received to the use of the son.

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[10] (1765) 3 Burr. 1794, 1804.

[11] (1847) 16 M. & W. 778, 780.

The authority signed by Winifred stands in a different position, because she was of full age. She cannot say it was not her document. The plea of non est factum is not open to her. But she can assert that she was the testator's daughter and that she was under the testator's influence when she signed it and in receipt of no independent advice. That is sufficient to negative any idea that there was a gift by her to the testator. And, if the authority did not operate as a gift to the testator, what was its effect? I cannot myself regard it as a loan, for the simple reason that a loan is a contract, and there is no evidence of any such contract. It seems to me that, on the assumption that there was initially an advancement, any money which the testator withdrew from his daughter Winifred's account by virtue of the authority was money had and received by him to her use.

If there was initially an advancement, therefore, Richard and Winifred would have had a good cause of action against the father for money had and received. But what about the Limitation Act, 1939? It seems to me that the testator would here be in a dilemma. When he drew the money from the bank, either he intended to use the children's money as his own, or he did not. If he did intend to use it as his own and told them nothing about it, then the very nature of his dealing amounted to a fraudulent concealment from them of their right of action; and the period of limitation did not start to run until the children discovered it: see section 26 (6) of the Limitation Act, 1939, and *Beaman* v. *A. R. T. S. Ld.*[12] If the father did not intend to use the money as his own, but on behalf of the children as he ought to have done, then he was a trustee of it and he has since converted it to his own use, and the children are not bound by any period of limitation: see *Lyell* v. *Kennedy*,[13] and *Soar* v. *Ashwell*[14]; see also section 19 (1) (*b*) of the Limitation Act, 1939.

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[12] [1949] 1 K.B. 550.

[13] (1889) 14 App.Cas. 437, 438.

[14] [1893] 2 Q.B. 390.

In my opinion, therefore, the point raised by Sir Lynn fails. I find myself in agreement with Harman J. when he said that, if the original allotments in the names of the children are to be treated as advancements, "the rest of the claims follow logically "on," and also with his view that, "having regard to the "claimant's ignorance," the Limitation Act, 1939, would not have afforded a defence.

This brings me, therefore, to the real question in the case, which is this: When the testator put these shares into the names of the children, did he intend them as advancements to the children or not? And on this question we have heard much argument about the admissibility of evidence.

It is said in some of the textbooks that the contemporaneous acts and declarations of the father are admissible, but not subsequent acts or declarations unless they are against his interest. I do not think that is correct. A distinction must be drawn between subsequent acts and subsequent declarations. Whenever the courts have to ascertain the intention of a person in doing an act, it is always permissible to look to subsequent acts and conduct on his part which throw light on his intention. Take the familiar case where a man takes and drives away a motor-car without the consent of the owner. The offence depends upon his intention at the time of taking it. If he intended to deprive the owner permanently of it, he is guilty of theft; if he merely intended to use it for a temporary purpose, he is not guilty of theft but only of a statutory offence. On the question of his intent, his subsequent conduct is most relevant, whether for him or against him. If he at some later time returns the car to its owner, that is admissible evidence to negative an intent to steal. Thus, if he returns it after a few hours, it is strong evidence; but if he waits for several months it is weak evidence. If he only returns it after he knows the police are on his track, then a jury might well think that, at the time of taking, he intended to deprive the owner of it permanently and was guilty of theft, and that the return of it was a belated attempt to manufacture evidence in his favour. But there is no doubt that the return of it can be given in evidence in his favour. The weight to be attached to it is entirely for the jury: see Hale's Pleas of the Crown, Vol. 1, p. 509. Declarations by a man about his intention in doing an act stand on a different footing. Contemporaneous declarations are admissible, but not subsequent declarations, at any rate not in his own favour. Statements made voluntarily by a man as to his past intention can always be given in evidence by the other side, but they cannot be given in evidence on his own side. If the man who took the motor-car afterwards tells an acquaintance: " I took the " car with the idea of selling it," that is admissible in evidence against him as an admission; but if he tells a friend: " I only " took the car for a drive round," he cannot call the friend to give the statement in evidence, because it is hearsay. If the accused man desires to say that, he must say it on oath in the witness-box.

I have taken the trouble to state those elementary propositions because, save for the Evidence Act, 1938, the rules of evidence are the same in civil actions as in criminal matters, and I see no reason why they should be any different in the cases about advancement. If a question arises between father and son, or between the father's representatives and the son, as to the intention of the father when he put property into his son's name, then the subsequent acts and conduct of the father are, in my opinion, admissible, whether for him or against him. The weight to be attached to them is entirely for the tribunal of fact. There are many cases where such evidence has been received, and none that I can find where it has been rejected, though, to be sure, the weight attached to it has varied. Thus, in the common case where the father buys property in his son's name and afterwards takes the rents and profits for himself, no one has doubted that his receipt of the rents and profits is a relevant circumstance and admissible in evidence. In 1677 Lord Nottingham L.C. himself admitted it, together with evidence of other subsequent acts of ownership by the father, in the original case in which this subject was discussed, *Grey* v. *Grey*,[15] and the only question which troubled him was the weight to be attached to it. Seventy years later, in 1748, when Lord Hardwicke L.C. had occasion to consider the matter, he stated quite generally that " where a father " takes an estate in the name of his son, it is to be considered " as an advancement, but that is liable to be rebutted by " subsequent acts." See *Pole* v. *Pole*.[16] To go on forty more years, in the leading case of *Dyer* v. *Dyer*,[17] where a father took property in the name of himself and his eldest son in succession, and afterwards made a will leaving it to his younger son, the Court of Exchequer (sitting on its equity side) admitted evidence of the father's conduct in leaving it by will, though it was held not sufficient to rebut the presumption. In *Finch* v. *Finch*,[18] Lord Eldon L.C. admitted evidence of an uncle's will, though he declined to attach any importance to it. Likewise in *Crabb* v.

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[15] 2 Swanst. 594, 597.

[16] (1748) 1 Ves.Sen. 76.

[17] (1788) 2 Cox Eq.Cas. 92.

[18] (1808) 15 Ves. 43.

Crabb,[19] Lord Brougham L.C. admitted a codicil in evidence, though he gave no weight to it. In 1875, in *Marshal* v. *Crutwell*,[20] Sir George Jessel M.R. admitted evidence of subsequent acts by a husband and held that in the circumstances the presumption was rebutted.

It is sometimes said that it is not so much the father's subsequent conduct which is admissible, but rather the acquiescence of the son in it. That was the view expressed by Lord Langdale M.R. in the case of Lord Stowell's advancements: see *Sidmouth* v. *Sidmouth*.[21] I confess I do not follow this line of reasoning. It is not the son's intention which is in question; it is the father's intention, and his intention at the time when the property was put in the son's name. The son may not have known anything of the transaction when the property was put into his name. He may not have heard anything of it until years later. Yet when the son discovers that it is in his name and finds that his father is receiving dividends from it, it is agreed on all hands that his acquiescence is admissible in evidence. On what ground is this acquiescence admissible? It can only be on the ground that it is an admission by the son to this extent: "I know that my father "never intended me to have this property." In drawing that inference, the son in most cases has nothing to go upon except the conduct of his father subsequent to the transaction. If the son's inferences from subsequent conduct are admissible, surely the inferences of the court are also admissible.

It is instructive to observe that in all the many cases where a father has received the dividends, no son has ever sought to recover them back from the father or his estate; and in *Dyer* v. *Dyer*, Eyre C.B. gave a broad hint that no son would be allowed to do so. The Chief Baron said[22]: "Now would the court sustain a "bill by the son against the father for these rents? I should "think it pretty difficult to succeed in such a bill." It should be noticed that the Chief Baron made that observation in regard to a case where the son was under age and was therefore incapable of acquiescence to his detriment. If the son in such a case is disentitled to recover the rents, the reason must be because the subsequent conduct of the father is strong evidence that he intended to retain a life interest in the property, taking the income of it during his life, but intending that the property itself should belong to the son after his death. In short, the subsequent conduct is admissible as evidence of the father's intention.

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[19] 1 My. & K. 511.

[20] (1875) L.R. 20 Eq. 328.

[21] 2 Beav. 447, 454.

[22] 2 Cox Eq.Cas. 92, 95.

Turning now to subsequent statements or declarations made by a father, in which he states what his intention was at the time of the transaction, it is quite clear that their admissibility follows the common law rules. If, and in so far as, they amount to admissions by the father that he intended to give the property to his son, they are admissible against him or his estate on the ground of admissions. If he is dead and they are declarations against his interest, they are admissible on that ground. If they are statements in his favour, to the effect that he intended that the property should belong beneficially to him, they are inadmissible on the ground of hearsay; but, be it noted, on that ground only. It is not because they are subsequent to the transaction, but because they are hearsay, that they are not admitted. Once the objection of hearsay is overcome, as it can be if the father is alive and comes to give evidence, then his statement on oath is admissible, even though it is made many years after the transaction: see *Devoy* v. *Devoy*.[23] Nowadays the objection of hearsay can also be overcome under the Evidence Act, 1938. If the father is dead and before his death made a written statement at a time when litigation was not pending or anticipated, his statement is admissible in evidence, though its weight is entirely for the judge.

It has been suggested that there is good reason why subsequent declarations should not be admissible, because "if the "rule were otherwise it would be extremely easy for persons "to manufacture evidence." (See *Warren* v. *Gurney*,[24] *per* Morton L.J.) But, with great respect, that is a consideration going to the weight of the evidence, not to its admissibility. It is extremely easy for a father to invent his subsequent evidence on oath, but nevertheless it is admissible, although the judge may attach little weight to it. So also it is extremely easy for a father to take the son's income, and for the son out of filial piety to acquiesce, but, nevertheless, it is admissible, although the judge may attach little weight to it, at any rate, so far as the corpus is concerned.

These considerations lead me to the conclusion that the admissibility of evidence in these cases is to be governed by the same rules as in other civil actions; and, according to those rules, in order to ascertain a man's intention, evidence is admissible, not only of the nature of the act and his contemporaneous statements which are part of the transaction, but also of any

[23] 3 Sm. & G. 403.

[24] [1944] 2 All E.R. 472, 473.

subsequent acts and conduct on his part which throw a light on his intention. That was the view of Harman J. and I entirely agree with it. It is much better to have a simple rule like this, which can be easily applied without resort to precedents, rather than a rule of exclusion, which is subject to numerous exceptions, and can only be applied after much research into the books, and then only with hesitation and uncertainty.

This brings me at long last to the facts. There is, to start with, the presumption of advancement. That is not, as I understand it, a presumption of conclusive or compelling force. It is, as was said in *Dyer* v. *Dyer*,[25] a "circumstance of evidence," which means, I take it, that it is like other well-known presumptions—the presumption that a man intends the natural consequences of his acts, for instance, or the presumption of res ipsa loquitur—a provisional presumption only. It gives rise to an inference which may—not must—be drawn. If there is no other evidence on either side, an advancement will unhesitatingly be inferred; but, if there is other evidence pointing one way or the other, then the tribunal of fact must, at the end of the case, come to its own conclusion whether an advancement was intended or not, giving proper weight to the natural inclination of a father to provide for his son, but also taking into account all other circumstances.

Approaching the facts in that way, what do we find? The testator put shares into the names of his children but he never told them anything of what he had done, although they were of an age well to understand it, indeed two of them were of full age. Not only did he tell them nothing about it, but thenceforward he dealt with the shares as if they were solely his property and no concern of the children at all. When a large dividend was declared on their shares, he took it for himself and used it to pay off his own debts. When an opportunity arose to sell the shares at a great profit, he sold them without a word to them and took the proceeds for himself. It is true that a few days later he did, on his accountant's advice, put the proceeds into deposit accounts in the names of his children, but he promptly neutralized that action by getting them to sign authorities enabling him to draw on the accounts as he pleased; and thenceforward he used the money as his own. All this would have been most reprehensible, if it had been the children's money that he was using. He ought at least to have told them what he was doing and to have got their consent to it. But he said not a word to them. He got them to sign all the necessary documents by telling them where to sign, and they signed, and that is all they knew about it. Such absolute dominion goes far to show that he never intended to make a gift to them, but always intended that the shares and their proceeds should belong to him.

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[25] 2 Cox Eq.Cas. 92.

Now contrast his action over the shares, with his actions over house property and over loan capital to the estates company. He put those in the children's names, but he told them what he had done, and he never used them as his own. At his death, the children took the houses and the loan capital absolutely, and a very ample provision it was for them, £50,000 apiece. There is no doubt that those were advancements and that the children have the benefit of them. But not content with that, they seek in this action to go back 18 years and say that the testator, all those years ago, took away shares and money which belonged to them and converted it to his own use. It is a monstrous claim to make against a father who treated them so well. The truth is that the shares and money never belonged to them; and I think that they must at the time have known it and since forgotten it, otherwise they would not have signed the documents so blindly as they did. I find myself in full agreement with the judge who tried the case, and I would dismiss the appeal.

ROMER L.J. The question whether the result of a voluntary transfer of property by a parent into the name of his child is to vest not only the legal title to the property, but the beneficial interest therein as well in the child depends on the intention of the parent at the time of the transfer. It accordingly resolves itself into a question of fact to be determined in the light of all admissible evidence. The fact that the transferee is the child of the transferor is a circumstance of evidence which suffices, in the absence of any other evidence, to displace the presumption of resulting trust, which normally arises in cases where the transferee is a stranger in blood to the transferor. The relationship of parent and child is, however, by no means conclusive of the parent's intention, but is only an indication, and it may be either confirmed or overridden by such other evidence as may be available and admissible as to the state of the parent's mind in relation to the transaction at the time when it was effected. The principles as stated above are well established in our law and are applicable equally to purchases by a father in the name of his child, as to transfers to the child either by the father or by some third party at the father's direction.

A question, which was much discussed on the hearing of the present appeal, was as to the limits of admissibility of matters which might, if they were accepted for consideration, illuminate the intention of a parent at the time that he passed property into the legal ownership of his child; and, in particular, whether the acts or conduct (as distinct from the declarations) of the father subsequent to the transaction may properly be admitted in evidence as being relevant to his state of mind at the time of the transaction itself. It has been suggested that all such acts and conduct are admissible in evidence, it being a matter for the judge to decide whether any, and, if so, what, weight or value should be attributed to them. For myself I find a difficulty in accepting this view, which appears to me to be in conflict with long-standing authority and with the opinion of the text writers on the subject, who treat subsequent acts by the parent as being just as inadmissible in general to support a resulting trust as is evidence of the parent's subsequent declarations. (See, for example, Underhill on Trusts, 10th ed., p. 187; Ashburner's Equity, 2nd ed., p. 110; White and Tudor's Leading Cases, 9th ed., Vol. 2, p. 775; Lewin on Trusts, 15th ed., p. 148.) Certain acts at least of a parent performed subsequent to the transaction, and referable to the property transferred, seem to me to be manifestly irrelevant to an inquiry as to his intention at the time of the transaction itself. For example, a man transfers property to his son in 1930. In 1940 he makes a will bequeathing the property to someone else. This testamentary disposition is, in my opinion, not only entitled to no weight in ascertaining what the transferor's intention was in 1930, but it should not be received in evidence at all. This view is in conformity with *Finch* v. *Finch* [26] and *Crabb* v. *Crabb*,[27] in which cases the precise point was considered by Lord Eldon L.C. and Lord Brougham L.C. respectively, and with cases such as *Sidmouth* v. *Sidmouth*,[28] *Jeans* v. *Cooke* [29] and *Christy* v. *Courtenay*.[30] The reason for rejecting such a testamentary act as evidence is the same as that which was explained by this court in *Warren* v. *Gurney* [31] as the ground for rejecting a parent's subsequent declarations, namely, that they could be manufactured by the parent for his own ends. The further objection that the testator might well have forgotten about the earlier gift when he made his will is possibly more germane to the weight to be attributed to the testamentary act than to its actual admissibility. What I have said with regard to subsequent testamentary dispositions of a parent would apply equally in principle to other subsequent conduct, for example, acts of ownership by him over property which he had transferred to his son, when such acts were initiated some years after the date of the transfer and were never made known to the son. Such acts would, as I think, be wholly inadmissible as evidence to support an intention by the father of resulting trust. (See *Murless* v. *Franklin*.[32]) I would add, with regard to Lord Hardwicke L.C.'s observation in *Pole* v. *Pole* [33] that the presumption of an advancement " is liable to be rebutted " by subsequent acts," that it is pointed out (rightly, as I think) in Underhill on Trusts, 10th ed., p. 187, that Lord Hardwicke L.C.'s dictum must surely be given a narrower interpretation than that which his words seem to imply.

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[26] 15 Ves. 43.

[27] 1 My. & K. 511.

[28] 2 Beav. 447.

[29] (1857) 24 Beav. 513.

[30] 13 Beav. 96.

[31] [1944] 2 All E.R. 472.

What subsequent acts or events, then, are properly admissible in evidence for the purpose of ascertaining the father's intention in transferring property to his child? Without attempting any exhaustive definition, the following categories of conduct seem to me to qualify: First, evidence of acts both by father and son is receivable if against interest, for such acts operate as admissions; secondly, acts are admissible if they are so associated with the original transaction as, in effect, to form part of it; for example, the continued retention by a father, upon the uncommunicated purchase of property in his son's name, of the title deeds, and of accrued and accruing rents subsequently paid by the tenants; thirdly, I think that subsequent acts are admissible, if they tend to show a course of dealing as between parent and child. For example, a father buys shares for a child in circumstances which, if taken alone, would tend to establish an advancement. Evidence would, I think, be admissible to show that both before and after this particular transaction the father made purchases of shares in the same company in the name of the same child avowedly as nominee for himself; for this evidence would be relevant to the question of whether the particular transfer should be taken in isolation or should be regarded as one of a series of transactions, and thus be stamped with the same characteristic as attached to the others.

I now turn to the question of what was the intention of the

[32] (1818) 1 Swanst. 13.

[33] (1748) 1 Ves.Sen. 76.

testator in the present case, Philip Edward Shephard, when, in 1929, he secured the allotment to his children of shares in the private companies which he and Mr. Mayer promoted. This is obviously the prime issue in the case, for I respectfully agree (for the reasons stated by my brother Denning in his judgment) with the view of Harman J.[34] that if "the original allotments of "shares in their names with the private companies are to be "treated as advancements to them, so that they became once "for all the beneficial owners of those shares, the rest of the "claims follow logically on." The argument for the plaintiffs Richard and Winifred before us was that the allotments ought to be so treated, with the result that, from the moment when the allotments were made, they became the absolute and sole beneficial owners of the shares allotted to them respectively. The contrary argument for Philip, the party attending, was that Richard and Winifred were not intended by the testator to have any beneficial interest in the shares at all, but were mere pegs on which the testator found it proper to hang the legal title for his own personal convenience. After the most careful consideration of what is, I think, a difficult case, I have come to the conclusion that the intention of the testator was something betwixt and between that which is attributed to him by Richard and Winifred and that for which their brother Philip contends.

In my judgment the testator, in having the shares allotted to Richard and Winifred, did intend to confer a benefit upon them, but one that was future, nebulous, and subject to an overriding control which was to remain vested for an indefinite period in himself. If he thought right to let them have a dividend, then they were to have it, but not otherwise. If he sold the shares they were to take such part of the proceeds as he decided to give them, but no more. He might, indeed, dispose of such proceeds wholly in some other direction and, if he did, so much the worse for them; but underlying all this was an intention that, in addition to receiving such gifts as he might confer upon them from time to time, they should ultimately inherit whatever remained undisposed of at his death. There is nothing surprising in a father forming an intention such as this, especially when he is a man who is engaged in activities of a somewhat speculative character demanding a ready supply of capital, to whom it would be inconvenient to part irrevocably with funds which he might require at short notice for the furtherance of his enterprises.

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[34] [1953] 1 W.L.R. 460, 467.

C. A.

1953

SHEPHARD v. CARTWRIGHT.

Romer L.J.

A comparable intention was in fact established to the satisfaction of the court in the case of the father in *Devoy* v. *Devoy*.[35] The admissible considerations in the present case point strongly, in my judgment, to the view that such was the intention of the testator. In the first place, the course of dealing as between him and his children (which, as I have already indicated, is, in my opinion, relevant) supports the view. From the earliest times, as to which evidence is available, the testator put property into the names of his children for his own purposes, without intending to vest any immediate beneficial ownership in them and, indeed, in most cases, without telling them anything about it. Examples of this are to be found in the registration under the Registration of Business Names Act, 1916, of a business in the names of "R. D. & P. E. Shephard," the hairdressing business at Dartford, which he established in the name of his daughter Winifred, and the furnishing business which was carried on at premises at Torquay, ostensibly belonging to Richard, and which was registered as the property of Richard & Grimes. Then, with regard to the houses which he apparently bought in the names of Richard and Winifred from time to time, Richard said in evidence that the testator first told him of the purchases which had been made in his name from 1929 onwards, some time after he attained 21 in November, 1935. As to one of such properties, a house at Hastings, Richard's evidence was that this was bought in his name by the testator in 1932 or 1933, but the testator did not tell him so until 1936 or 1937. The testator had converted the house into flats, which were not a success, so he put in a manageress to run the place as a hotel. This also was a failure because the manageress took to drink, and it was not until then that the testator told Richard of the original purchase and asked him to take over the property, which he did. The service contract of the manageress was apparently with Richard, though he did not realize that this was so until he took over the property from her. Richard did not receive the rents of any of the properties standing in his name until about 1936 when, he said, they were given to him.

As to the properties in Winifred's name, she made her home in the house at Streatham which the testator bought for her in 1934, but she never received any of the rents of the other properties at all, receiving only an allowance from her father of £84 a month. Her evidence was not that the testator gave these properties to her, so that they should belong to her at once. He told her, apparently, that they would be something for her when she was older and when he had gone; she understood from him that he was making her a present of them to come to her, as she said, eventually. It would appear, therefore, that, with regard to the house properties bought in these children's names from 1929 onwards, no immediate or absolute gift was intended or made, but they remained subject to the testator's dominion and control.

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[35] 3 Sm. & G. 403.

This characteristic attached also, in my opinion, to the allotment of the shares. Neither Richard nor Winifred was at any time in a position to sell the shares or otherwise deal with them, for neither of them ever had a share certificate. Whether or not any share certificates were actually issued by the company is not definitely known, but none was ever in the possession of Richard or Winifred. Nor, indeed, did either of them know anything about the allotments at all. Although, therefore, they were the legal owners of the allotted shares, the position was that neither of them had either the means or the knowledge to turn them to any personal advantage. Neither did they fare any better with regard to income benefits deriving from the shares. Only one dividend was declared by any of the five private companies, and that was a dividend of £25 10s. tax free per share declared by New Ideal Homesteads Ld. There were 1,000 shares of this company, of which half were held by the Mayer family. The testator received 50 per cent. of the total dividend declared and applied it to his own purposes, notwithstanding that each of his three children held 100 shares in the company. In the course, however, of correspondence which subsequently ensued with the Income Tax Commissioners concerning this dividend, the testator told his accountant, Mr. Dunk, that each child had a beneficial interest in the dividend proportionate to his or her holding, and Mr. Dunk informed the commissioners accordingly. As a final example of the testator's complete disregard of the position of Richard and Winifred as shareholders, he obtained the vesting of their shares in the public company without their knowing anything about it, either, presumably, by purporting to transfer them himself or by procuring their signatures to share transfers in the same way that he, from time to time, procured their signatures to innumerable other documents. I regard all these matters with respect to the testator's control over the shares from the moment they were allotted as admissible evidence under the second head to which I have earlier referred: namely, events which are so associated with the original transaction as, in effect, to form part of the terms of that transaction.

Further proof of the testator's determination to retain control of the realizable value of the shares is to be found in the way in which he dealt with the matter when the shares were acquired by the public company. At or about the time of this acquisition, the testator procured from the plaintiffs their signature to documents which made him complete master of the situation. The first were powers of attorney authorizing the testator to act on Richard and Winifred's behalf in relation to every conceivable matter that might arise in connexion with their shares in the private companies. The second documents were authorities to the directors of the public company requesting them to pay to the testator the cash portion of the purchase consideration payable to them on the sale and to hand to him the allotment letters in respect of the shares to be allotted to them as further part of the consideration. It does not appear whether the testator acted under the powers of attorney (though he may have done so in order to pass to the public company Richard and Winifred's shares in the private companies) but he acted upon the authorities so as to possess himself of the cash consideration and their shares in the public company, which he forthwith proceeded to sell. He then applied the cash and the proceeds of the shares in a manner inconsistent with any possible view that he regarded them as belonging to his children in any absolute sense, though he indicated a recognition of some sort of beneficial interest being vested in them by establishing the deposit accounts in their names, albeit at the suggestion of Mr. Dunk. Richard and Winifred themselves knew nothing of these things at the time. This vague acknowledgment of the children's interests, however, was sufficiently fleeting, for within a few months he had drawn the whole of the moneys out of the deposit accounts, in pursuance of further authorities which he had obtained from Richard and Winifred, and applied them to purposes of his own. Later, however, he did take the definite step, which he communicated to them, of opening the loan accounts with Philip Edward Shephard Estates Ld., and thus of conferring upon each of them a substantial provision by way of advancement. The rest of the moneys derived from the original allotments he substantially disposed of in other directions; and, indeed, it is for that reason that these proceedings have belatedly been brought. It seems to me that his conduct in relation to Richard and Winifred's shares in the private companies and the consideration received from the public company upon their acquisition is of the same pattern as had characterized all the dealings with his children of which we have knowledge. He himself retained control in the same way as he had done of the earlier businesses and the houses. He had not found it convenient or proper to accompany the legal title to the businesses with any immediate beneficial interest. As to the house and real properties, he had given certain limited benefits (for example, he eventually gave to Richard the hotel at Hastings and the rents of the other properties from 1936), but any further benefits (and there might possibly be none) were to be reserved for the future. So also, in exactly the same way, he retained control of the shares in the private companies and of the purchase consideration when they were sold, but did in fact confer benefits, quantified by himself, through the medium of the loan accounts. From first to last he maintained a dominating control by means of documents which he prepared himself and which the children signed without question or demur. In these circumstances, it seems impossible to me to regard the original share allotments as constituting one single transaction, isolated and divorced from the other dealings, which the testator had with Richard and Winifred, both earlier and subsequently. I regard the allotment to Richard and Winifred of the private company's shares as constituting merely one link in a chain of transactions between parent and children and as possessing the same characteristics as the others: namely, the retention by the parent of control and dispositive power. The principal, if not the only, point of substance, in my opinion, which Richard and Winifred can urge against this view, is the fact that the agreement of May 16, 1934, expressly recites that the members of the Mayer family held their shares in the private companies as trustees for the elder Leo Mayer, whereas there is no such recital in favour of their father with regard to Richard and Winifred's shares. It may well be, however, that the scintilla of beneficial interest in them which the testator did undoubtedly recognize displaced in the testator's mind the applicability of such a recital. Be that as it may, I cannot think that this feature of the case is of any great consequence when one surveys the position as a whole; and, in so surveying it, I find myself in entire agreement with Harman J. when he said in his judgment[36]: "Considering the evidence as a whole, and "doing my best to weigh the circumstances on both sides, I feel

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[36] [1953] 1 W.L.R. 460, 473.

"obliged to come to the conclusion that the testator did not in "the earlier allotments of shares any more than in the transactions with the businesses intend to commit himself "irrevocably by way of out-and-out gifts. I take the view . . . "that these were only provisional arrangements not intended to "remove his freedom of action, and I find no principle of law "which prevents me from giving effect to that view." For these reasons I agree that the appeal should be dismissed.

Appeal dismissed

Solicitors: *Douglas & Co.; MacDonnell; Sidney Pearlman.*

B. A. B.

1953
July 2, 3, 6, 21.

Harman J.

PILKINGTON v. WOOD.

[1952 P. 1398.]

Damages—Solicitor—Negligence—Property conveyed with defective title—Negligence admitted—Mitigation—Measure of damage—Diminution in market value—Special damage—Whether within reasonable contemplation of parties.

In 1950 the plaintiff purchased freehold property in Hampshire; he had employed the defendant to act as solicitor in the transaction, and the vendor had purported to convey the property as beneficial owner. When the plaintiff attempted to sell the property in 1951, having changed his place of employment from Surrey to Lancashire, he found that the title was defective, since the vendor was a trustee of the property and had committed a breach of trust in purchasing it himself.

Negligence by the defendant was admitted, and the only issue was the quantum of damages. The plaintiff claimed, in addition to general damages for the difference in value of the property with a good title and its value with the defective title, special damage in respect of the following items: (a) expenses in connexion with his new employment, namely, hotel expenses for temporary accommodation in Lancashire, cost of running a car between Hampshire and Lancashire and telephone calls every night to his wife while in Lancashire; (b) cost of the valuation of the property required by his bankers at the time of the purchase; and (c) interest on his overdraft which remained because he was unable to sell the property.

The defendant contended that the plaintiff should, before bringing this action, have mitigated his damage by suing the vendor on the covenant for title implied under section 76 of, and Sch. II to, the Law of Property Act, 1925, since the vendor was expressed to convey as beneficial owner; alternatively, that the plaintiff should have taken out a policy of insurance against the consequences of the defect in the title:—

Held, (1) that the duty to mitigate did not extend so as to oblige the plaintiff to sue under the implied covenant for title, it being no part of the plaintiff's duty to embark on such litigation in order to protect the defendant from the consequences of his own carelessness.

Payzu Ld. v. *Saunders* [1919] 2 K.B. 581; 35 T.L.R. 657 and *British Westinghouse Electric and Manufacturing Co. Ld.* v. *Underground Electric Railways Company of London Ld.* [1912] A.C. 673 applied.

(2) That no satisfactory evidence was adduced that any policy of insurance to cover the defect could be obtained.

(3) That the proper amount of damages was the difference between the market value of the property at the time of the breach in 1950 with a good title and the market value it would have then had with a defective title.

(4) That no items of special damage were recoverable, since none of them could have been within the reasonable contemplation of the parties at the date of purchase of the property in 1950.

Hadley v. *Baxendale* (1854) 9 Exch. 341 and *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.* [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997 applied.

ACTION.

The plaintiff claimed that the defendant, when acting as his solicitor, had been guilty of negligence in advising him on the purchase of a property known as Ewshott Corner, Ewshott, Hampshire. The negligence of the defendant was admitted after the close of pleadings in the action, and the only issue which remained for decision was the quantum of damages.

In 1950 the plaintiff, a civil engineer who had hitherto worked in Lancashire, obtained employment in Surrey, and in order to live within reach of his work, he contracted to purchase the property in question and employed the defendant to act as his solicitor in connexion with the purchase. The purchase was completed by a conveyance dated April 27, 1950, by which the vendor, one Colonel Wilks, conveying as beneficial owner, assured the property to the plaintiff in fee simple for £6,000. The plaintiff raised this sum by an overdraft at his bank on which interest was payable. He paid the defendant his scale fee of £63 for acting as his solicitor.

The plaintiff in due course went into occupation of the property. He spent £400 to £500 in improvements and repairs and purchased for a further £334 certain land surrounding his first purchase, the possession of which considerably added to

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the amenities and the value of the original land. In December, 1951, the plaintiff relinquished his employment in Surrey and, as he wished to be free to take employment elsewhere, he put the property into the hands of local estate agents. They found a purchaser willing to pay £7,500 for it with the additional plot, and he, in December, 1951, entered into a contract to purchase the property. The plaintiff again employed the defendant as his solicitor.

The purchaser's solicitors, on being supplied with an abstract of the plaintiff's title, pointed out that there was a defect in it, and they declined to go on with the purchase; in consequence the deposit had to be returned, and a claim arose for costs thrown away.

The defect was that it appeared on the face of the abstract of title that Colonel Wilks, the vendor to the plaintiff, had partly under a conveyance of July 22, 1937, and partly under a conveyance of February 28, 1938, purchased the property from the trustees of his father's will, of whom he was himself one. He was therefore in breach of the rule that a trustee cannot validly purchase the trust property either directly or through an intermediary.

The plaintiff, in his claim for damages, alleged that as a result of the defendant's negligence he had acquired a property with an unmarketable title, or alternatively, a property which he could only sell at a substantial loss. He also claimed as special damage the cost of a number of items, which he alleged resulted from his being unable to sell the property at the price which he gave for it, and his consequent inability to buy another house convenient for his new employment.

Charles Russell Q.C. and *R. Cozens-Hardy Horne* for the plaintiff. Negligence is admitted and the only question is as to the measure of damages. The plaintiff is entitled to damages on the principle of restitutio in integrum, that is, the difference between the value of the property at the date of purchase with a good title (that is what the plaintiff believed he had purchased) and the value it in fact had with a defective title: *Lake* v. *Bushby.*[1]

The defendant asserts that the plaintiff has not acted reasonably because he has not mitigated his damage by suing Colonel Wilks on the covenant for title under section 76 (1) (A) of and

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[1] [1949] 2 All E.R. 964.

Sch. II to the Law of Property Act, 1925. Such litigation would have been extremely hazardous; the evidence is that Colonel Wilks would have denied his liability and blamed his solicitor, and it is doubtful, moreover, whether the plaintiff could sue under the covenant for title as Colonel Wilks was not really the beneficial owner though expressed to convey as such: see *Fay* v. *Miller, Wilkins & Co.*[2] The action was not therefore one which a reasonably prudent man would ordinarily take in the course of business, and the plaintiff was not under any duty to embark on such litigation: *British Westinghouse Electric and Manufacturing Co. Ld.* v. *Underground Electric Railways Company of London Ld.*[3] To hold that it was reasonable for the plaintiff to be obliged to bring such an action in order to minimize his damage would be to take the doctrine of mitigation much further than it has ever been taken before.

Although an action under the covenant for title might assist the court in assessing the damages, it is manifestly unreasonable that the plaintiff should be forced to take proceedings now; if, for instance, he recovered £x, and later the threat of ejection by a beneficiary became real, he would not feel secure in spending any money on the house, as he could only recover for the things actually proved to be improvements.

The defendant also asserts that the plaintiff could take out an insurance policy against any claim by a beneficiary, but there is no evidence that a policy of the type required could be obtained.

The question of mitigation is, therefore, irrelevant in assessing the damages. The defendant's negligence has resulted in the plaintiff having a permanently defective title; damages under the main head should be £3,500, being the difference between the value of house with a good title at the time of the breach and its value with a defective title. The amount, if any, to be attributed to the value of an action under the covenant for title, on the footing that Colonel Wilks might be willing to pay something to avoid litigation, should be merely nominal.

With regard to damages under the special heads, the plaintiff is entitled to such damages as could be reasonably expected to flow from the breach: *Hadley* v. *Baxendale*[4]; *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.*[5] The plaintiff claims as damages under these heads all the expenses which he has incurred as a result of his being unable to sell his house except at a sacrificial price. These include interest on his overdraft at the bank which he obtained in order to buy the house, and cannot pay off now by selling it; his travelling expenses between his home and his new work, and his bills for temporary hotel accommodation.

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[2] [1941] Ch. 360; 57 T.L.R. 423; [1941] 2 All E.R. 18.

[3] [1912] A.C. 673.

[4] (1854) 9 Exch. 341.

[5] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997.

The defendant must be deemed to have known that the plaintiff might want to change his employment and sell his house in order to live elsewhere; that was not unreasonable, nor was it unreasonable that he should not wish to sell his house with a defective title at a loss.

J. Pennycuick Q.C. and *E. I. Goulding* for the defendant. The plaintiff's damages cannot be properly assessed in the manner proposed by him because he has not taken any reasonable steps to mitigate his damage: *Payzu Ld.* v. *Saunders.*[6] The plaintiff cannot recover from the defendant anything which he might have recovered by suing Colonel Wilks under the covenant for title. Colonel Wilks conveyed as beneficial owner and is therefore liable under section 76 of and Sch. II to the Law of Property Act, 1925. It is not in dispute that Colonel Wilks is a man of substance, and the defendant offered the plaintiff an indemnity against costs. There was no reason, therefore, why the plaintiff should not have brought that action before suing the defendant. The plaintiff was not obliged to wait until a claim had been made against him: *Turner* v. *Moon.*[7] The plaintiff could have obtained a policy of insurance to indemnify him against any claim; policies in respect of defective titles are well known, but he has not taken any such step.

The plaintiff's claim for damages under the special heads is too remote; those damages could not be said to flow directly and in the usual course of things from the defendant's wrongful act: *The Edison.*[8] The defendant could not reasonably have foreseen that as a result of a defective title the plaintiff would incur heavy travelling expenses and bills for hotel accommodation. The defendant cannot be liable for interest on the plaintiff's continued overdraft because he cannot sell his house; that is a result of the plaintiff's financial position and not of the defective title. None of these items was within the reasonable contemplation of the parties at the time of the contract: *The Edison* [8]; *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ld.*[9] They do not come

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[6] [1919] 2 K.B. 581; 35 T.L.R. 657.

[7] [1901] 2 Ch. 825.

[8] [1932] P. 52; 48 T.L.R. 224.

[9] [1952] 2 Q.B. 297; [1952] 1 T.L.R. 1066; [1952] 1 All E.R. 970.

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within the rule in *Hadley* v. *Baxendale*[10] as to the remoteness of damage, and they should all be disallowed.

The real loss is the result of the plaintiff's refusal to mitigate this damage.

Russell Q.C. replied.

Cur. adv. vult.

July 21. HARMAN J., reading his judgment after stating the facts: It was admitted before me that the class of persons claiming under the will of which the vendor Wilks was a trustee was not closed, and might embrace infants or persons unborn, and that for a number of years at any rate it would be impossible to say with certainty that no claim could arise to upset the transaction, although hitherto in fact no claim has been made. This is clearly a serious blot on the title, and not one that can be described with any propriety as a technical defect. There is a real danger that anyone acquiring this property with notice may be dispossessed of it hereafter. A beneficiary claiming to have the property restored to the trust must agree that the original purchase-money paid by Colonel Wilks and, in addition, money spent in improvements shall be repaid. That sum was assumed here to amount to £2,500. I ought to say that the defect in title does not extend to the further plot purchased by the plaintiff in 1951, but that plot by itself is of no greater value than the amount that the plaintiff paid for it.

It would appear then at first sight that the measure of the defendant's liability is the diminution in value of the property; that is to say, the difference between the value in 1950, the date of the plaintiff's purchase of the property with a good title and with the title which it in fact had.

The defendant, however, argues that it is the duty of the plaintiff before suing him in damages to seek to recover damages against his vendor Colonel Wilks under the covenant for title implied by reason of the conveyance as beneficial owner. It is said that this duty arises because of the obligation which rests on a person injured by a breach of contract to mitigate the damages. This suggestion seems to me to carry the doctrine of mitigation a stage further than it has been carried in any case to which I have been referred. The classic statement of the doctrine is that of Lord Haldane in *British Westinghouse Electric and Manufacturing Co. Ld.* v. *Underground Electric Railways Company of London Ld.*[1] The Lord Chancellor expressed it thus[2]:

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[10] 9 Exch. 341.

[1] [1912] A.C. 673.

[2] [1912] A.C. 673, 688.

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"The quantum of damage is a question of fact, and the only "guidance the law can give is to lay down general principles "which afford at times but scanty assistance in dealing with "particular cases. The judges who give guidance to juries in "these cases have necessarily to look at their special character, "and to mould, for the purposes of different kinds of claim, "the expression of the general principles which apply to them, "and this is apt to give rise to an appearance of ambiguity. "Subject to these observations I think that there are certain "broad principles which are quite well settled. The first is that, "as far as possible, he who has proved a breach of a bargain to "supply what he contracted to get is to be placed, as far as "money can do it, in as good a situation as if the contract had "been performed. The fundamental basis is thus compensation "for pecuniary loss naturally flowing from the breach; but this "first principle is qualified by a second, which imposes on a "plaintiff the duty of taking all reasonable steps to mitigate "the loss consequent on the breach, and debars him from "claiming any part of the damage which is due to his neglect to "take such steps. In the words of James L.J. in *Dunkirk* "*Colliery Co.* v. *Lever*,[3] 'the person who has broken the contract "'is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable "'men, and the plaintiffs not being under any obligation to do "'anything otherwise than in the ordinary course of business.'"

For the present purpose it seems to me that it is apposite to state the plaintiff's rights in the words of Scrutton L.J. in *Payzu Ld.* v. *Saunders* [4] thus [5]: "he can recover no more than "he would have suffered if he had acted reasonably, because "any further damages do not reasonably follow from the "defendant's breach. . . ."

Ought then the plaintiff as a reasonable man to enter on the litigation suggested? It was agreed that the defendant must offer him an indemnity against the costs, and it was suggested on the defendant's behalf that if an adequate indemnity were offered, if, secondly, the proposed defendant appeared to be solvent, and if, thirdly, there were a good prima facie right of action against that person, it was the duty of the injured party to embark on litigation in order to mitigate the damage suffered. This is a proposition which, in such general terms, I am not prepared to accept, nor do I think I ought to entertain it here, because I am by no means certain that the foundations for it exist.

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[3] (1878) 9 Ch.D. 20, 25.

[4] [1919] 2 K.B. 581; 35 T.L.R. 657.

[5] [1919] 2 K.B. 581, 589.

It may be conceded that the indemnity offered would be adequate and that Colonel Wilks is a man of substance. It was clear, however, that he would resist any claim and would in his turn claim over against his solicitors, for that was his attitude in the witness-box.

About the third condition much more doubt exists. I listened to a considerable argument based upon the extremely difficult words in which is couched the contract to be implied under section 76 of and Sch. II to the Law of Property Act, 1925, the defendant averring and the plaintiff denying that liability would arise in this case under these words. This is a question which I do not propose to decide. Nor need I decide whether Colonel Wilks, having regard to his position, was the "beneficial owner" of the property so as to bring the covenant into operation, it being a sine qua non that the covenantor must be in fact, as well as being expressed to be, the beneficial owner; compare the observations of Sir Wilfrid Greene M.R. in *Fay* v. *Miller, Wilkins & Co.*,[6] where he was discussing the covenant implied in an assurance as personal representative.[7] It appears to be the law that a breach of the covenant can be sued on at once and that there is no need to wait till a claim is made against the covenantee: see *Turner* v. *Moon*.[8]

I do not propose to attempt to decide whether an action against Colonel Wilks would lie or be fruitful. I can see it would be one attended with no little difficulty. I am of opinion that the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party. The damage to the plaintiff was done once and for all directly the voidable conveyance to him was executed. This was the direct result of the negligent advice tendered by his solicitor, the defendant, that a good title had been shown; and, in my judgment, it is no part of the plaintiff's duty to embark on the proposed litigation in order to protect his solicitor from the consequences of his own carelessness.

Next the defendant suggested that the injury might be lightened by a policy of insurance designed to cover the consequences of the defect. As to this, it is enough to say that no satisfactory evidence was adduced that any such policy could be obtained. Policies to cover defects of title are, it appears, common enough when supported by cross covenants on the part of the author of the defect, here Colonel Wilks. It is clear that he would have been entirely unwilling to enter into such a covenant, and in the absence of that there was no evidence that a policy could be obtained nor what its cost would be. In any event, though a policy might mitigate the pecuniary damage, it would not mend the title or make the purchase more attractive to a person buying the property for a home as this property would be bought.

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[6] [1941] Ch. 360; 57 T.L.R. 423; [1941] 2 All E.R. 18.

[7] [1941] Ch. 360, 363.

[8] [1901] 2 Ch. 825.

It remains then to consider what is a proper amount of damage. This is necessarily highly speculative. The plaintiff was not bound, in my judgment, to resell in order to quantify it, particularly having regard to the fact that until quite recently the defendant denied that he was guilty of negligence. It is clear enough from the plaintiff's experience with the purchaser he found, that an ordinary purchaser finding the title defective in this respect will merely throw up the purchase, and that it would be necessary to explain in advance by way of condition of sale the existence of the defect. The result would be, I think, to bring forward a different class of purchaser, namely, the speculator willing to chance the future, but only because the property can be had cheap. The several elements to be brought into account are on the one side, first the sum which would have to be paid before the property were returned to the trust; next, the chance that no claim will ever be made, and that the title will eventually ripen into security; and thirdly, the chance of recovering something against Colonel Wilks on his covenant for title. The sum involved under the first head may, having regard to the evidence, be put at £2,500, that under the second is not negligible after the lapse of fifteen years without a claim, and that under the third cannot be put very high as it would involve litigation with its attendant expense and delay and the uncertainty as to its result. On the other side of the account must be put the insecurity of the purchaser's tenure and the difficulties he would encounter should he wish to raise money by mortgage or to resell. On the evidence £6,000 may be taken as the true value of the property with a good title at the date of the breach in 1950.

Balancing one factor against the other as best I can after listening to the evidence, I think a fair estimate of the diminution in value of the property from its market price at the date of the breach in 1950 of £6,000 with a good title ought to be set at £2,000.

Beyond this which may be styled the general damage, the plaintiff claimed damages under a number of special heads. These were: (1) the defendant's scale fee of £63; (2) the cost of improvements done by the plaintiff and of the extra purchase; (3) the plaintiff's expenses in connexion with his new employment; (4) the cost of a valuation of the property; (5) interest on an overdraft; and (6) costs thrown away. I will deal with these in order. The first is the scale fee. It was conceded that this could not be recovered in this action, The second was cost of improvements and of the extra purchase, This claim was abandoned at the hearing. The third was the plaintiff's expenses in connexion with his new employment. In order to understand this some further facts must be stated.

The plaintiff's contract for resale of the property at £7,500 was made in December, 1951, and it appears that it was not until this event that he felt free to look for further employment. This he found in Lancashire where he had formerly been employed, and he entered on his new job on February 1, 1952. On February 18, 1952, he was obliged to return the deposit of £750 made on the contract of the previous December, the defect in his title having by then been discovered. As a result, being unable to complete the sale of the Hampshire property, he had not the financial means to purchase another property within reach of his new work, and he has ever since found himself temporary accommodation in Lancashire during the week and returned to his Hampshire home, where his wife has continued to reside, at weekends. His claim under this head is first for hotel expenses, which he puts at £175, secondly for the running expenses of his car between Hampshire and Lancashire, which he puts at £250, and thirdly for the expense of telephone calls to his wife every evening during his periods of separation from her, in respect of which he claims £50.

In my judgment, none of these sums is recoverable against the defendant. They do not fall within the second rule in *Hadley* v. *Baxendale*[9] as to remoteness of damage. This rule has recently been canvassed by Asquith L.J. in *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.*[10] thus[11]: "What "propositions applicable to the present case emerge from the

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[9] 9 Exch. 341.

[10] [1949] 2 K.B. 528; 65 T.L.R. 274; [1949] 1 All E.R. 997.

[11] [1949] 2 K.B. 528, 539.

"authorities as a whole, including those analysed above? We "think they include the following:—(1) It is well settled that "the governing purpose of damages is to put the party whose "rights have been violated in the same position, so far as money "can do so, as if his rights had been observed: (*Sally Wertheim* "v. *Chicoutimi Pulp Co.*[12]) This purpose, if relentlessly "pursued, would provide him with a complete indemnity for all "loss de facto resulting from a particular breach, however "improbable, however unpredictable. This, in contract at least, "is recognized as too harsh a rule. Hence, (2) in cases of breach "of contract the aggrieved party is only entitled to recover such "part of the loss actually resulting as was at the time of the "contract reasonably foreseeable as liable to result from the "breach. (3) What was at that time reasonably so foreseeable "depends on the knowledge then possessed by the parties or, at "all events, by the party who later commits the breach."

These items were not, in my judgment, within the reasonable contemplation of the parties when the defendant assumed the duty of advising the plaintiff. The change of place of the plaintiff's employment was not one of the chances that could have been known to either of them. It was the voluntary act of the plaintiff, not a result of any contract existing when the bargain was made. The plaintiff chose a new job in Lancashire; he might as well have selected one more remote in Kamschatka or less remote in Hampshire. The defendant cannot be responsible for the expense. The plaintiff might have bought or rented accommodation suitable to his new employment, and there is no evidence that the defendant knew that his financial position might render this impracticable. Still less can the defendant be called upon to pay for the telephone calls, a luxury no doubt exemplary, yet uxorious.

The fourth head is a sum of 25 guineas paid by the plaintiff to a valuer who, in 1950, was employed by him to value the property in order to quiet the doubts of the plaintiff's bankers as to his financial position. He complains that he would never have incurred this expense had he know that his title was defective. No doubt this is true; but the defendant cannot be supposed to know that any such step was required by the plaintiff's position or contemplated by him. This claim I reject.

The fifth claim represents the sum paid by the plaintiff to his bank on an overdraft which he says would not have existed had he been able to sell the property as he contracted to do as

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[12] [1911] A.C. 301.

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before stated. Here again it is objected that the defendant is being asked to pay for the plaintiff's impecuniosity, and it is pointed out that there is no evidence that the defendant knew that the purchase-money had been borrowed by the plaintiff, and, moreover, that if the plaintiff had been able to sell he would have incurred a new liability similar to the old. In this connexion I was referred to *The Edison*,[13] and to *Trans Trust S.P.R.L.* v. *Danubian Trading Co.*[14] On the whole, I am of the opinion that the plaintiff does not make out his case on this point. His evidence was that it was his intention to purchase another house with the proceeds of sale of his present one and to finance the new purchase in the same way as before, namely, by an overdraft secured on the new property.

It appears to me, however, that, in order to put the plaintiff as far as possible in the position in which he would have been if there had been no breach, I must treat him as having sold the property at the date when the cause of action arose for what it would then fetch. This price I have assumed to be £4,000. He would then have been £2,000 out of pocket. The defendant therefore should recoup that sum with interest upon it. Under section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, the court has jurisdiction to award interest on damages from the date when the cause of action arose, and accordingly the sum of £2,000 will carry interest at 4 per cent. per annum from April 22, 1950, till the date of this judgment.

The sixth head of damages for costs thrown away was a matter of agreement at the hearing, and that agreement will be embodied in the judgment.

Judgment for the plaintiff.

Solicitors: *Norton, Rose, Greenwell & Co.; William Charles Crocker.*

I. G. R. M.

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[13] [1932] P. 52; 48 T.L.R. 224.

[14] [1952] 2 Q.B. 297; [1952] 1 T.L.R. 1066; [1952] 1 All E.R. 970.

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SHARKEY (INSPECTOR OF TAXES) *v.* WERNHER.

Revenue — Income tax — Stud farm — Trade under Sch. D — Racing stables——Recreational and not taxable—Transfer of horses from stud to stables—Value attributable to transferred horses in stud farm accounts.

The respondent's wife carried on the activities of a stud farm which were admitted to be taxable under Sch. D as "farming" activities. She also carried on separately racing stables which were non-taxable, and for which she bred horses at her stud farm. On the transfer of five horses in the relevant year of assessment from the stud to the stables:—

Held, that the amount to be credited in the stud farm accounts on the transfer of the horses was their market value on an assumed notional sale. The general principle that a person could not trade with himself or make a profit out of himself was unexceptionable in itself, but the Income Tax Act by splitting the personality of the taxpayer into two parts, and putting the two parts into different schedules, had already made some invasion of that principle.

Watson Bros. v. *Hornby* (1942) 24 T.C. 506; 168 L.T. 109; [1942] 2 All E.R. 506 followed.

CASE STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

The commissioners discharged an assessment to income tax in the estimated sum of £5,000 for the year 1949/50 on the respondent, Sir Harold Wernher. The assessment was made in respect of the profits of the respondent's wife, Lady Zia Wernher, arising from a stud farm.

Lady Zia carried on the activities of a stud farm on certain premises at Newmarket, and those activities were admitted, for the purposes of the present appeal, to be "farming" activities, which by virtue of section 10 of the Finance Act, 1941, and section 31 (1) (*a*) of the Finance Act, 1948, were to be treated as the carrying on of a trade of which the profits were charged to tax under Case I of Sch. D. She also carried on separately other activities, namely, those of racing and training horses; such activities were neither farming nor any other kind of trading but were purely "recreational" in character, and gave rise to no liability to tax.

Lady Zia bred horses at her stud farms for her racing stables, and from time to time transferred, or moved, horses from the farms to the stables. In the relevant year five horses were so transferred or moved by her. In the stud farm accounts the cost of breeding those horses had been debited, and the question was what sum in respect of the five horses ought, consequent upon such transfer or move, to be brought into such accounts as a receipt or credit.

The respondent said that the proper figure to be so brought into the accounts was the cost of breeding the transferred horses, the same figure appearing on both sides of the accounts, or, alternatively, omitted altogether. The Crown, on the other hand, contended that it should be the market value of the animals, namely, the price which they would have fetched on an assumed notional sale, such value being considerably more than the cost of breeding them.

The commissioners held that the cost of breeding was the correct figure, and accordingly discharged the assessment on the estimated market value of the horses. The Crown appealed from that decision.

Sir Reginald Manningham-Buller Q.C., S.-G., and *Sir Reginald Hills* for the Crown. There is no dispute that the stud farm and the racing stables constituted two separate activities carried on by Lady Zia. The transfer of five horses from the stud to the stables must be treated as an assumed notional sale from one separate activity to the other. The price to be credited in the stud farm accounts on such a notional sale must be the market value of the horses, i.e., the price which they could reasonably be expected to fetch in the market. That price considerably exceeds the cost of their breeding, and that excess over the cost of breeding should be treated as a profit and subject to tax. The case is indistinguishable from *Watson Bros.* v. *Hornby*,[1] where chicks from a hatchery were transferred to brooder houses to form part of the farm stock, and it was held that the correct price to be credited in the accounts in respect of the transferred chicks was the market value, which in the circumstances was a reasonable one. [Reference was also made to *Inland Revenue Commissioners* v. *William Ransom & Son Ld.*[2]]

Frederick Grant Q.C., *John Senter Q.C.* and *Peter Rowland* for the taxpayer. On the Crown's submission Lady Zia makes a profit on the transferred horses which should be subject to tax, but a person cannot make a profit out of himself: *Dublin Corporation*

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[1] (1942) 24 T.C. 506; 168 L.T. 109; [1942] 2 All E.R. 506.

[2] [1918] 2 K.B. 709; 34 T.L.R. 533.

v. *M'Adam*[3] and *Laycock* v. *Freeman, Hardy & Willis Ld.*[4] The cost of breeding the horses transferred from the stud to the stables is embedded in the debit side of the stud farm accounts; but as there was no sale of these animals at all, it would be wrong as a matter of law if in the computation of the profits of the stud farm a profit (or, indeed, a loss) were shown in respect of this transfer. As the cost is shown on the debit side of the profit and loss account, a figure equal to that cost must be brought in on the credit side; alternatively, it could be left out of both sides of the profit and loss accounts altogether.

Watson Bros. v. *Hornby*[5] is indistinguishable from the present case, but it is submitted that that case was wrongly decided, since no one can make a taxable profit out of himself; and it is inconsistent with certain dicta of the Court of Appeal in *Laycock* v. *Freeman, Hardy & Willis Ld.*[6] and *Briton Ferry Steel Co. Ld.* v. *Barry*,[7] where it was held that a trader could not be taxed in respect of a profit which he had not really made. *Watson Bros.* v. *Hornby*[8] should not therefore be followed, and the price to be credited in the accounts should be the cost of breeding the horses and not the price on an assumed sale at an imaginary profit.

Manningham-Buller Q.C., S.-G., in reply. *Watson Bros.* v. *Hornby*[8] was not wrongly decided; the principle that a man cannot make a profit out of himself does not apply where the taxpayer carries on two separate activities, which may be assessable under different schedules. The two decisions of the Court of Appeal which were cited related to a notional sale on the succession to discontinued businesses, and have no relation to the present case.

Cur. adv. vult.

July 21. VAISEY J., reading his judgment, after stating the facts: My decision in this case is based on the fact that it is, in my judgment, indistinguishable in principle from an earlier decision, namely, that of Macnaghten J. in *Watson Bros.* v. *Hornby.*[1] Mr. Grant, for the respondent, now admits this, but contends that case ought not to be followed on the grounds (1) that it was plainly wrong, and (2) that it was irreconcilable with the decisions of the Court of Appeal in *Laycock* v. *Freeman, Hardy & Willis*

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[3] (1887) 2 T.C. 387.

[4] [1939] 2 K.B. 1; 55 T.L.R. 218; [1938] 4 All E.R. 609.

[5] 24 T.C. 506.

[6] [1939] 2 K.B. 1.

[7] [1940] 1 K.B. 463; 56 T.L.R. 248; [1939] 4 All E.R. 541.

[8] 24 T.C. 506.

[1] 24 T.C. 506; 168 L.T. 109; [1942] 2 All E.R. 506.

Ld.[2] and *Briton Ferry Steel Co. Ld.* v. *Barry.*[3] I am not altogether satisfied on either point, but taking the second one first it seems to me that the statements upon which Mr. Grant relies in the two Court of Appeal cases (to which I will refer in a moment) ought not necessarily to be treated as axiomatic, but rather as being of general though not universal application. Those two cases both dealt with the question of succession to discontinued businesses, and there is no doubt that the judgments in each case were based on the general principle that it is not legitimate to charge a man with the notional profits of a notional sale made or assumed to be made by himself to himself. In the *Briton Ferry* case Sir Wilfrid Greene M.R. said[4]: " It is not legitimate, " in my view, to apply the sub-rule "—that is, rule 11 (2) of Sch. D, Cases I and II—" in such a way as to introduce some " element of notional profit with the result of charging the tax- " payer in respect of a profit which he has never realized."

I turn at once to *Watson Bros.* v. *Hornby,*[5] which, in my view, governs the present case. I will read the headnote: " The " appellants carried on the business of poultry breeders and " dealers. In addition to keeping birds on their farm for laying " purposes, they had a hatchery which produced chicks primarily " for sale as ' day-old chicks,' although some were transferred " to brooder houses and became part of the stock on the farm. " In accordance with the decision in *Thornber Bros. Ld.* v. " *Macinnes,*[6] the appellants were assessed to income tax for the " years 1931–32 to 1934–35 under Sch. D in respect of the profits " of the hatchery part of their business, and under Sch. B in " respect of the profits of the farm. On appeal against the " assessments under Sch. D, the appellants contended that, in " computing the profits of the hatchery, the day-old chicks trans- " ferred to the farm should be credited as stock at the average " price at which they were sold, and could have been bought, " in open market, viz., 4d. per chick, and that the difference " between that price and the admitted cost of production of each " saleable day-old chick, 7d., was an allowable loss. The Crown " contended that the hatchery and the farm were two activities " of the same person who could not make a loss by transferring " from one department to the other; that no allowance could be " given for an unrealized loss, and that the chicks should be

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[2] [1939] 2 K.B. 1; 55 T.L.R. 218; [1938] 4 All E.R. 609.

[3] [1940] 1 K.B. 463; 56 T.L.R. 248; [1939] 4 All E.R. 541.

[4] [1940] 1 K.B. 478.

[5] 24 T.C. 506.

[6] (1937) 21 T.C. 221.

"credited to the hatchery account at production cost. The "General Commissioners accepted the Crown's contention. "*Held*, that in the notional sale between the hatchery and the "farm, which should be treated for this purpose as separate "entities, the price to be credited was the 'reasonable price' "laid down by section 8 of the Sale of Goods Act, 1893, and that "on the admitted evidence this reasonable price must be the "market price of 4d. per chick."

Note that the decision was (1) that a notional sale must be assumed between the two businesses of Watson Brothers and (2) that the two businesses must be treated for the purpose of the notional sale as separate entities.

Obviously that decision could not be reconciled with the two cases in the Court of Appeal if the proposition upon which those cases were based is universally and in all circumstances valid. The commissioners thought that the decision was distinguishable from the present case on the following ground, viz., "That in "that case there were for income tax purposes two businesses, "namely, a farm (then assessed under Sch. B) and a hatchery "(assessed under Sch. D) and stock was transferred from the "hatchery to the farm and became stock-in-trade of the latter." They add, "In the present case, the horses were simply taken "out of the stock of Lady Zia's stud farm and did not become "stock in trade of any other business."

With respect, I cannot see that this is a true distinction. The justification for departing in the case of *Watson Bros.* v. *Hornby* [7] from the general principle that a man cannot trade with himself, buy from himself, sell to himself, and make notional profits out of himself, was obviously this: that the Income Tax Act itself had, by splitting the personality of the taxpayer, and putting the two parts of him into different schedules, made such a notional dichotomy inevitable. If that is the explanation, I cannot see why a similar consequence should not follow from the splitting of Lady Zia's activities between farming which is taxable and racing which is not. I am by no means convinced that *Watson Bros.* v. *Hornby* [7] was wrongly decided, and I think that it is my duty to follow it.

I was very much impressed by Mr. Grant's arguments, and apart from authority I might well have accepted them, though the point is, on any view of the matter a doubtful and difficult one.

[7] 24 T.C. 506.

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Vaisey J.

It is not necessary for me to refer in detail to the other cases to which my attention was directed. The Crown's contentions are supported by the authority of *Inland Revenue Commissioners* v. *William Ransom & Son Ld.*[8] On the general principle that the notion of a man trading with himself is not an admissible conception, see *Dublin Corporation* v. *M'Adam.*[9] From the judgment in that case I may quote what Palles C.B. said[10]: "No man, in my opinion, can trade with himself; he cannot, in "my opinion, make, in what is its true sense or meaning, taxable "profit by dealing with himself. . . ." This principle is unexceptionable in itself, but the legislature itself has, in my view, made inevitable some invasion of it.

The appeal will be allowed and the case remitted to the commissioners to adjust the assessment.

Appeal allowed.

Solicitors: *Baylis, Pearce & Co., for Stevens & Bolton, Farnham; Solicitor of Inland Revenue.*

I. G. R. M.

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[8] [1918] 2 K.B. 709; 34 T.L.R. 533.

[9] 2 T.C. 387.

[10] Ibid. 397.

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July 30.

Roxburgh J.

In re T—— (INFANTS).

In re GUARDIANSHIP OF INFANTS ACTS, 1886–1925.

Infant—Custody—Maintenance—Amount—Whether means of mother to be taken into consideration—Guardianship of Infants Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 45), *s.* 3 (1) (2).

A stipendiary magistrate gave the custody of two children to their mother. On an application by her for an order for maintenance under section 3 of the Guardianship of Infants Act, 1925, the magistrate took evidence from her as to her means and made an order on that footing, expressly stating that he had taken her means into account:—

Held, that in assessing the quantum of maintenance, the magistrate had acted rightly in taking the means of the mother into account.

ASSIGNED MATTER (heard in open court by the direction of the judge).

This was an application by a mother by way of appeal from the order of a stipendiary magistrate, made under section 3 of the Guardianship of Infants Act, 1925,[1] whereby she was granted the custody of the two children of her marriage with their father and whereby he was ordered to pay a certain sum to the proper officer of the court for their maintenance. The application by the mother was that the sum payable by him might be increased.

The grounds of her application were: (1) that the amount of maintenance ordered was inadequate; (2) that the magistrate was wrong in law in that he took into consideration the means of the mother in assessing the amount of maintenance; (3) that he was wrong in law in that he failed to consider what was reasonable maintenance for the two children, having regard to the means of the father only; and (4) that in deciding the amount the magistrate had failed to act in accordance with the provisions of section 3 of the Guardianship of Infants Act, 1925.

C. A. Coode for the mother. The question is whether, having regard to the provisions of section 3 (2) of the Act, the means of the mother may be taken into consideration as well as those of the father in assessing a periodic sum under that subsection. The point has not so far been determined. [Counsel referred to *Wharton* v. *Wharton*.[2]]

The means of the mother must not be taken into consideration. There appears to be no point in putting the words "having regard "to the means of the father" into section 3 (2), if the means of the mother are also to be taken into consideration. The section bears the meaning "the court may further order that the father "shall pay to the mother towards the maintenance of the infant "such periodical sum as the court may think reasonable, having "regard to all the relevant circumstances, including means, but, "as to means, having regard to those of the father only."

S. Seuffert for the father. Under section 5 (4) the court had a discretion to order the mother as well as the father to contribute towards the maintenance of an infant in respect of whom a guardian had been appointed. The Act clearly intends that the means of both the father and the mother shall be taken into consideration. In section 3 (2) the operative words are that the court " may " further order that the father shall make a payment to the mother, having regard to his means. That merely means that an order should not be imposed on him which he could not meet.

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[1] Guardianship of Infants Act, 1925, s. 3: "(1) The power of the "court under s. 5 of the Guardianship "of Infants Act, 1886, to make an "order as to the custody of an infant "and the right of access thereto may "be exercised notwithstanding that "the mother of the infant is then "residing with the father of the "infant.

"(2) Where the court under the "said section as so amended makes "an order giving the custody of the "infant to the mother, then, whether "or not the mother is then residing "with the father, the court may "further order that the father shall "pay to the mother towards the maintenance of the infant such weekly "or other periodical sum as the court, "having regard to the means of the "father, may think reasonable."

[2] [1952] 2 All E.R. 939n.

ROXBURGH J. This appeal is designed to raise a point of law which I am told is causing some difficulty, though I must confess that the section has been applied in the Chancery Division for many years and yet the nature of this difficulty has not previously become exposed.

It arises in this way: The stipendiary magistrate gave the custody of two girls to the mother, and then the mother asked for an order for maintenance. The relevant section is section 3 of the Guardianship of Infants Act, 1925. [His Lordship read it.] Counsel for the mother deliberately abstained from calling evidence as to the mother's means and submitted that, for the purposes of subsection (2), the means of the mother were wholly irrelevant. The magistrate took a different view, called the mother into the witness box and took evidence from her as to her means and made an order on that footing, expressly stating that he had taken the mother's means into account, so as to enable counsel for the mother to raise this point of law on an appeal. The result, therefore, is this: that if he was right in taking the means of the mother into account, his order stands, but, if he was wrong, the matter will have to be remitted to him for reconsideration. Therefore, it is in truth that rare case on these appeals when the whole question is one of law.

I must read also section 5 (4), because counsel for the appellant relied on it, though, in my judgment, it is strongly against him. Section 5 provides: " (1) The father of an infant may by " deed or will appoint any person to be guardian of the infant " after his death. (2) The mother of an infant may by deed or " will appoint any person to be guardian of the infant after " her death. (3) Any guardian so appointed shall act jointly " with the mother or father, as the case may be, of the infant " so long as the mother or father remains alive unless the mother " or father objects to his so acting. (4) If the mother or father "so objects, or if the guardian so appointed as aforesaid considers that the mother or father is unfit to have the custody of the infant, the guardian may apply to the court, and the court may either refuse to make any order (in which case the mother or father shall remain sole guardian) or make an order that the guardian so appointed shall act jointly with the mother or father, or that he shall be sole guardian of the infant, and in the latter case may make such order regarding the custody of the infant and the right of access thereto of its mother or father as, having regard to the welfare of the infant, the court may think fit, and may further order that the mother or father shall pay to the guardian towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable."

Now, of course, the difference between section 3 (2) and section 5 (4) is manifest. There is no power under section 3, if custody is awarded to the father, to order the mother to make any contribution towards the maintenance of the child, but under section 5 there is a power to order not only the father but also the mother to make a contribution towards that maintenance by payment to a guardian. Therefore, the difference between the two sections seems to me to point clearly to this: that the words "having regard to the means of the mother or father" are linked up with the word "pay"—"pay . . . having regard to the means of the mother or father"—in section 5 (4), and the words "having regard to the means of the father" may well be similarly linked in section 3 (2) where the mother is omitted, because she does not ever have to pay under the latter subsection.

The point that is taken is that, by reason of the phraseology of section 3 (2), the court is not entitled to take into account the means of the mother in assessing the quantum of maintenance. I am unable to adopt that view. It seems to me quite clear what the section is intending to achieve, and also that it can achieve it without the insertion or addition of any words at all. It will be noticed that the whole thing is permissive—the court may make such an order—and the court, in considering whether to exercise its discretion, has first of all to address itself to the needs of the infant as regards its maintenance. It will be noticed that the phrase is "towards the maintenance of the infant," not "in satisfaction of" or "in discharge of," or anything of that sort. It is "towards the maintenance." The first thing that the court has to consider is: What does the infant need? For

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that purpose, the court has to consider the age of the infant, whether it is at school or in a perambulator or at a university—those are all relevant considerations—whether it has been brought up in a gold-lined cradle or whether it has not. That is not immaterial. I mean, its standard of life hitherto is by no means immaterial. It would surely quite plainly be permissible to consider whether it had funds provided for its maintenance by some deceased grandparent or aunt; and why should it not be considered how far its mother is able to maintain it? I can see no reason for excluding that one circumstance, which seems to me to be very relevant, from all the other relevant circumstances which have to be considered.

Then counsel quite properly says: "Why, then, is there this "reference to the means of the father?" To my mind, the reason is quite plain. Though the first thing to be looked at is what is reasonably required for the maintenance of the infant, it may well happen that what is reasonably required for the infant is more than it is just to order the father to contribute, having regard to his financial position. He is the person who has to pay, and this is a safeguarding provision that, though one has to consider in the first instance what is reasonably required, one must never order the father to pay more than is reasonable having regard to his means; and the reason why the mother is not mentioned there is because she never has to pay under this subsection, and the reason why the mother is mentioned in subsection (4) of section 5 is because under that section she does sometimes have to pay. In my view, the section fits like a glove.

Most incredible results would follow if the only thing that the court could consider, in exercising its discretion under this subsection, were the means of the father; so incredible that counsel did not suggest that that was the interpretation. He says that it should be read as follows: "The court may further order that "the father shall pay to the mother towards the maintenance "of the infant such sum as the court may think reasonable, "having regard to all relevant circumstances, including means, "but, as to means, having regard to those of the father only." That was his final submission, which I asked him to formulate for me precisely. I can only say that the section does not say anything at all resembling that; and, as I do not find it difficult to construe the section without inserting any words, I am not prepared to insert a number of words such as would be required to enable me to construe the section in the manner which counsel has suggested. It is, of course, no answer in law to say

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that counsel has for the first time raised this point on a section which has been applied without question on innumerable occasions. That is no answer at all; but it is comforting to me to feel that it is possible to give to this section a construction which has, I think, been adopted without question over some 30 years or so.

Accordingly, in my judgment, this appeal must be dismissed.

Declaration accordingly.

Solicitors: *Hepburns; F. W. Baldwin.*

J. L. D.

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Apr. 22, 23.

Harman J.

In re SUTHERLAND SETTLEMENT TRUSTS.

[1953 S. 432.]

Settled Land — Improvement — Applicability of capital money — Unauthorized repairs executed before 1948 *by assign of tenant for life—Similar repairs authorized by and executed after coming into force of Agricultural Holdings Act,* 1948*—Tenant for life as trustee —Discretion of trustees of settlement—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *ss.* 73 (1) (iv); 75 (1), (2); 83; 107; *Sch. III—Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 1 (2); 81 (1); 94 (1); 96 (1); *Sch. III.*

In 1927 the tenant for life under a settlement comprising agricultural land conveyed his beneficial interest to a company. In 1945, 1946 and 1947 the company, as owner of that life interest, spent £4,457 13s. executing on that land repairs the cost of which was not payable out of capital moneys arising under the Settled Land Act, 1925. From March 1, 1948, when Sch. III to the Agricultural Holdings Act, 1948, became operative, until December 1, 1950, the company executed similar repairs at a cost of £4,575 10s. 4d. which the trustees, at the direction of the tenant for life, pursuant to section 75 of the Settled Land Act, 1925, paid to the company as for an improvement authorized by the Settled Land Act, 1925, as being repairs of a nature specified in para. 23 of Part II of Sch. III to the Agricultural Holdings Act, 1948. The tenant for life also directed the trustees likewise to pay for the repairs executed before March 1, 1948. The trustees, however, refused, on the ground that when they were carried out the cost of them was not payable, or expected by the tenant for

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life or the company to be paid, out of capital, and so was not payable thereout under the Agricultural Holdings Act, 1948:—

Held, (1) that the tenant for life, in giving a mandate to the trustees under section 75 of the Settled Land Act, 1925, was acting as trustee and was under a duty to have regard, as trustee, to the interests not only of himself and his assign, but of the remainderman;

(2) that, in the provision in section 73 (1) (iv) of the Settled Land Act, 1925, as amended by section 96 (1) of the Agricultural Holdings Act, 1948, that capital money arising under the Act shall be applied in payment as for an improvement authorized by the Act of any money expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings Act, 1948, or any previous enactment or under custom or agreement or otherwise, the words "or otherwise" mean "or otherwise under some "obligation";

(3) that the expenditure, having been incurred before the Act of 1948 was in force, could not be recouped under section 73 (1) (iv) of the Settled Land Act, 1925, as amended;

(4) alternatively, that where, as in the present case, the expenditure had already been incurred before 1948 not in reliance on the statute's contemplating that it should be incurred, the tenant for life was not entitled as an afterthought to ask for recoupment after the law had been changed by the Agricultural Holdings Act, 1948, and that the trustees had a discretion in the exercise of which they ought not to apply the capital money as requested in paying for those particular improvements.

In re Duke of Northumberland, decd. [1951] Ch. 202; [1950] 66 T.L.R. (Pt. 2) 1045; [1950] 2 All E.R. 1181—in which the court did not deal with the question whether the repairs, some of which were done before 1948, were done under or in pursuance of the Agricultural Holdings Act, 1948, and in which the tenant for life was not, as in the present case, in effect putting money into his own pocket—not followed.

ADJOURNED SUMMONS.

By a conveyance dated March 29, 1927, and made between the tenant for life of certain settled estates and a company who were the applicants on this summons, the tenant for life conveyed to the company his beneficial life interest. The settled estates comprised "agricultural land" within the definition in section 1 (2) of the Agricultural Holdings Act, 1948, and, in relation to that agricultural land, the company (as owner of the tenant for life's beneficial life interest) spent £4,457 13s. in executing certain repairs between March 1, 1945, and February 29, 1948. Repairs of a similar nature were executed by the company since March 1, 1948, at a cost, to December 1, 1950, of £4,575 10s. 4d. At the direction of the tenant for life, given under section 75 of the

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Settled Land Act, 1925,[1] the trustees of the settlement paid the costs of these latter repairs to the company as for an improvement authorized by the Settled Land Act, 1925, as being repairs of such a nature as were specified in para. 23 of Part II of Sch. III to the Agricultural Holdings Act, 1948.[2] They were not, however,

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[1] Settled Land Act, 1925, s. 73 (1): "Capital money arising under "this Act . . . shall . . . be . . . "applied . . . in one . . . of the "following modes (namely) . . . "(iv) in payment as for an improvement authorized by this Act of any "money expended and costs incurred "by a landlord under or in pursuance "of the Agricultural Holdings Act, "1923, or any similar previous enactment, or under custom or agreement "or otherwise, in or about the execution of any improvement comprised "in Part I or Part II of the First "Schedule to the said Agricultural "Holdings Act."

S. 75 (1): "Capital money arising "under this Act shall . . . be paid "either to the trustees of the settlement or into court at the option of "the tenant for life, and shall be "invested or applied by the trustees, "or under the direction of the court, "as the case may be, accordingly."

Subs. (2): "The investment or "other application by the trustees "shall be made according to the "direction of the tenant for life, and "in default thereof according to the "discretion of the trustees, but in the "last-mentioned case subject to any "consent required or direction given "by the settlement with respect to "the investment or other application "by the trustees of trust money of "the settlement, and any investment "shall be in the names or under the "control of the trustees."

S. 83: "Improvements authorized "by this Act are the making or "execution on, or in connexion with, "and for the benefit of settled land, "of any of the works mentioned in "the Third Schedule to this Act, or "of any works for any of the purposes mentioned in that Schedule, "and any operation incident to or "necessary or proper in the execution "of any of those works, or necessary "or proper for carrying into effect "any of those purposes, or for "securing the full benefit of any of "those works or purposes."

S. 107 (1): "A tenant for life or "statutory owner shall, in exercising "any power under this Act, have "regard to the interests of all parties "entitled under the settlement, and "shall, in relation to the exercise "thereof by him, be deemed to be in "the position and to have the duties "and liabilities of a trustee for those "parties."

[2] Agricultural Holdings Act, 1948, s. 1 (2): "For the purposes of this "and the next following section, "the expression 'agricultural land' "means land used for agriculture "which is so used for the purposes of "a trade or business. . . ."

S. 81 (1): "Where under powers "conferred by the Settled Land Act, "1925, . . . capital money is applied "in or about the execution of any "improvement specified in the Third "Schedule to this Act no provision "shall be made for requiring the "money or any part thereof to be "replaced out of income, and "accordingly any such improvement "shall be deemed to be an improvement authorized by Part I of the "Third Schedule to the Settled Land "Act, 1925."

S. 94 (1): "In this Act, unless the "context otherwise requires, the following expressions have the meanings hereby respectively assigned to "them, that is to say . . . 'Fixed "'equipment' includes any building "or structure affixed to land and any "works on, in, over or under land, "and also includes anything grown "on land for a purpose other than use "after severance from the land, consumption of the thing grown or of "produce thereof, or amenity, and prepared to pay the costs of those executed before March 1, 1948, without the directions of the court. The company, on the other hand, took the view that those repairs also were of the nature of the repairs specified in para. 23 [2] and, by this summons, taken out on January 27, 1953, asked that the trustees be directed or authorized to apply £4,457 13s. out of capital money in payment (as for an improvement authorized by the Settled Land Act, 1925) of a like sum expended by the company in or about the execution between March 1, 1945, and February 29, 1948, of such repairs as were specified in para. 23 in relation to agricultural land subject to the settlement. The company contended that all the repairs which it had carried out between those dates were "repairs to fixed equipment" within the meaning of the Agricultural Holdings Act, 1948, all of which were reasonably required for the proper farming of the land in question; and it was stated in an affidavit that, in so far as any of the land was let, none of the repairs were repairs which the respective tenants were under an obligation to carry out.

Denys Buckley for the company. By virtue of the Agricultural Holdings Act, 1948, all the repairs executed before 1948 are improvements authorized by the Settled Land Act, 1925. The combined effect of sections 81 (1), 94 (1) and 96 (1) of the Agricultural Holdings Act, 1948, is that in section 73 (1) (iv) of the Settled Land Act, 1925, the reference to the Agricultural Holdings Act, 1923, must be read as if it were to the Agricultural Holdings Act, 1948, so that para. (iv) will read: "in payment "as for an improvement authorized by this Act of any money "expended and costs incurred by a landlord under or in pursuance "of the Agricultural Holdings Act, 1948, or any similar previous

"any reference to fixed equipment on "land shall be construed accordingly. ". . ."

S. 96 (1): "References in any "enactment, other than an enactment "contained in the Agricultural Holdings Act, 1923, or the Agriculture "Act, 1947, to the First Schedule to "the said Act of 1923, shall be construed as follows, that is to say: "(*a*) references to Part I, II or III "thereof shall be construed respectively as references to the Third "Schedule to this Act, to Part II of "that Schedule and to the Fourth "Schedule to this Act. . . ."

[2] Third Schedule: "Improvements "begun on or after March 1, 1948, "for which compensation is payable "if consent of landlord or approval "of the Minister is obtained to their "execution. . . . Improvements to "which consent of landlord or "approval of the Minister required. ". . . 23. Repairs to fixed equipment, being equipment reasonably "required for the proper farming of "the holding, other than repairs "which the tenant is under an "obligation to carry out."

"enactment, or under custom or agreement or otherwise, in or "about the execution of any improvement comprised in the Third "Schedule to the said Agricultural Holdings Act." "Comprised" there means simply "of a kind referred to": see *per* Tomlin J. in *In re Lord Sherborne's Settled Estate.*[3] In the present case, however, the repairs were executed before the Agricultural Holdings Act, 1948, came into force, so that the "costs" of them cannot be said to have been "incurred . . . under or in "pursuance of" it within the meaning of section 73 (1) (iv) of the Settled Land Act, 1925, or "in or about the execution of "any improvement comprised in" Sch. III to the Agricultural Holdings Act, 1948; they cannot be said to have been incurred "under any similar previous enactment," since the "similar" enactment "previous" to the Agricultural Holdings Act, 1948, was the Agricultural Holdings Act, 1943, and they were not incurred under that, and they cannot be said to have been incurred "under custom or agreement." As, therefore, they must have been "incurred" in some way, they must be covered by the words "or otherwise." Those words have a separate meaning of their own. They cannot be read as ejusdem generis with "custom or agreement," because "custom" and "agreement" are not ejusdem generis with each other.

[HARMAN J. Yes they are. "Custom" is merely "agree-"ment" sanctioned by user.]

Even so, the words "or otherwise" are not ejusdem generis with them because they are put in to include everything that does not come within statute or custom or agreement, that is to say, they make the whole of the paragraph after the words "Agricul-"tural Holdings Act, 1923"—or "1948" as it is to be read now—up to and including "or otherwise" otiose. Thus, the words "or otherwise" have to be read as meaning "or not," and what the trustees are to do in the present case is to apply capital money in payment as for an improvement authorized by "this Act" (i.e., the Settled Land Act, 1925) of any money expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings Act, 1948, in or about the execution of any improvement comprised in Sch. III to the said Agricultural Holdings Act.

It is not open to the court to hold that the repairs done before March 1, 1948, do not come within section 73 (1) (iv) of the Settled Land Act, 1925. In *In re Borough Court Estate*[4] it was held that the court could sanction recoupment of expenditure by a tenant for life on the settled land incurred before 1926 in so far as it was expenditure on "improvements" within the meaning of the Settled Land Act, 1925, and it appears that the only reason why the court did not do so in that case was because the applicant must at the time have expected himself to pay the sums spent on the repairs in question. In *In re Duke of Northumberland, decd.*,[5] some, but not all, of the repairs carried out by a tenant for life were "improvements" within section 96 of the Agricultural Holdings Act, 1948, and Sch. III thereto. Some had been carried out before March 1, 1948. Vaisey J. apparently took the view that they were done under or in pursuance of the Agricultural Holdings Act, 1948, and he held that the trustees were entitled to apply capital money in payment as for an improvement authorized by the Settled Land Act, 1925, of any money expended or to be expended or costs incurred or to be incurred by the tenant for life in or about the execution on or after January 1, 1945, of such repairs as were specified in para. 23 of Part II of Sch. III to the Agricultural Holdings Act, 1948, in relation to agricultural land, whether the same were comprised in a contract of tenancy or not, and whether within the definition of "agricultural holding" in section 1 of that Act or not; and he held also that the trustees were bound to comply with the directions of the tenant for life on being satisfied that the application of the capital money was, or would be, within the relevant provisions of the Settled Land Act, 1925, and consistent with his judgment. The present case is on all fours with that case. By section 75 (2) of the Settled Land Act, 1925: "the . . . application by the trustees "shall be made according to the direction of the tenant for life ". . ." That direction has been given, and accordingly the trustees must recoup the cost of these repairs out of capital and have no discretion whether they shall do so or not. In so doing, they can go back as far as they will. For example, with regard to current repairs carried out many years ago it would not be proper to allow nothing at all. The whole policy of the Agricultural Holdings Act, 1948, coupled with section 73 (1) (iv) of the Settled Land Act, 1925, is to keep settled property in a high state of repair, which might not be certain to be achieved if it was done out of income only.

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[3] [1929] 1 Ch. 345, 358.

[4] [1932] 2 Ch. 39, 40.

On these grounds, and in reliance on *In re Duke of Northumberland, decd.*,[5] the court is asked to hold that the trustees ought to reimburse the applicant company for such of the expenditure as can be said to relate to "repairs to fixed equipment" within the Agricultural Holdings Act, 1948.

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[5] [1951] Ch. 202; (1950) 66 T.L.R. (Pt. 2) 1045; [1950] 2 All E.R. 1181.

E. I. Goulding for the trustees. The trustees have to bear in mind that Vaisey J. in *In re Duke of Northumberland, decd.*,[5] plainly held that capital money could be used to defray these agricultural repairs whether the land was or was not let to a tenant. It is hard to see how he could so have held unless the words "or otherwise" following the words "custom or agreement" in section 73 (1) (iv) of the Settled Land Act, 1925, meant "or not." The trustees ask the court not to follow that decision. Counsel for the trustees in the present case was counsel for the tenant for life in that case, and he did not contend that there could there be recoupment except under the words "or "otherwise." What Vaisey J. decided, however, was that the trustees were entitled to apply capital moneys of the settlement in payment (as for an improvement authorized by the Settled Land Act, 1925) of any money expended or to be expended and costs incurred or to be incurred by the tenant for life in or about the execution on or after January 1, 1945, of repairs specified in para. 23 of Part II of Sch. III to the Agricultural Holdings Act, 1948, in relation to agricultural land, and that they must comply with the tenant for life's directions on being satisfied that the application of capital moneys was, or would be, within the Settled Land Act, 1925, and consistent with his judgment. Thus, he seems to have assumed that the repairs in question came within the Agricultural Holdings Act, 1948. That is the very question which arises in the present case.

In section 73 (1) (iv) of the Settled Land Act, 1925, the genus to which the words "the Agricultural Holdings Act, 1923"—now "1948"—"or any similar previous enactment, or under custom "or agreement or otherwise" belong is the genus "obligation." The words "or otherwise" are ejusdem generis with what precedes them, and mean "or otherwise under some obligation." There was no obligation to do these repairs which were done before March 1, 1948, and accordingly they do not come within section 73 (1) (iv) of the Settled Land Act, 1925. In the present case the tenant for life's power to direct application of the capital moneys does not help the applicant company, because it is inconsistent with his duty under section 107 to have regard to the interests of all parties entitled under the settlement. The trustees have to bear in mind the possibility that an infant as yet unborn may be interested. Again, *In re Duke of Northumberland, decd.*,[5] was a case of hardship, which the present case is not. Lastly, the court will be slow to admit claims relating to work done years ago because there is difficulty in obtaining evidence of the amounts spent. For these reasons the court is asked to dismiss this application.

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[5] [1951] Ch. 202.

E. G. Wright for the tenant in tail in remainder and the chargee of the tenant for life's life interest. The tenant in tail in remainder does not stand to benefit if this application is granted, but does not wish to oppose it.

HARMAN J. This is an application under the Settled Land Act, 1925, by a company who are the owners of the life estate of the Duke of Sutherland under a settlement of September 13, 1909; and the application is expressed to be made under sections 84, 93 and 113 of the Act. It seeks a direction to the Royal Bank of Scotland, who are trustees of the settlement, to recoup to the applicant money expended between 1945 and 1948 on what are said to be improvements of a nature authorized under the Settled Land Act. The company argues that the trustees were wrong in declining to pay that money; and, moreover, that they have no option but to make the repayment once they are satisfied, as the company say that they should be, that the work done comes within the purview of the Agricultural Holdings Act, 1948, and was the cause of the expenditure of the money. The points at issue are: first, whether in fact the trustees have no discretion in the matter, and, secondly, supposing that they have none, whether these works, which were done before an alteration of the statute which I shall have to detail in a moment, come within the statute as amended.

The facts are not complicated. The settlement was a settlement of real estate originally made in 1913 under which the Duke is and has been for a number of years the tenant for life. There is a jointure outstanding to his mother, and the only remainderman before me is the respondent, his niece, a Mrs. Janson, who is tenant in tail in remainder if the Duke have no issue. The Law Reversionary Interest Society Ld. was added by an amendment and is a necessary party having regard to the fact that it is an encumbrancer on the life interest of the Duke, he, or the company on his behalf, I take it, having sold to that society a slice of the settled income for the Duke's life. Therefore, under section 104 of the Settled Land Act, 1925, no application of capital money can be made except for certain purposes without its consent. That is forthcoming, and so is that of the remainderman, who, being sui juris, is entitled to take the view that she does not wish to oppose the application. But I have had an excellent argument from the trustees, who represent the possible unborn infant who may displace the interest of the present remainderman; and, of course, as she is tenant in tail and has not barred the entail, issue of hers may possibly be interested also.

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[5] [1951] Ch. 202.

The settlement being such as I have stated, most of the estates thereby settled have long since been sold. They were the Lilleshall and South Staffordshire estates. The settled property now consists of a comparatively large sum in gilt-edged securities and also an estate in Surrey called the Sutton Place Estate, which is partly agricultural land and partly land let for other purposes. The Duke, as life tenant under the settlement, by an instrument of March, 1927, conveyed his life interest to the applicant company, which is, one supposes, a family company formed, as many companies were formed in those days, to take over the family estates for tax reasons.

It appears from the evidence that, in the course of their administration of the Sutton Place Estate, the company in the years before 1948 spent moneys amounting to some £4,000 odd in repairs and improvements to the property of a nature which is set out in an exhibit to an affidavit; they are of a character which nobody would then have dreamed would have been payable out of capital. It was, therefore, the ordinary act of a landowner repairing, or rather maintaining, the property of which he was the owner; and it is to be observed that a very large amount of the repairs in question were done to properties which were let by the company to the Duke himself and which were, therefore, in effect, properties in hand; though nominally, no doubt, there was a lease. For instance, I find that in 1947 the largest single item in the whole application, £1,688, was spent on Ladygrove Farm, in the occupation of the Duke, in repairing roofs to farm buildings and building brick pillars to replace wooden supports, and so on. Many of the items asked for are of a comparatively trivial nature. One is rather surprised to find that repairing the water closet pan and joint to soil pipe in 1946 is set out as being the type of improvement which capital can be asked to shoulder. The whole matter has given me a good deal of disquiet; the fact being that if repairs of this sort can be done at the expense of capital, it is a complete revolution of all ideas that lawyers have had for many years about the relation between capital and income under the Settled Land Act, 1925.

Under that Act, as is well known, certain improvements might be done at the expense of capital, there being three categories: the first, from their permanent character, were allowed to be paid for out of capital outright; the second, an intermediate class, the cost of which the trustees or the court might require the tenant for life to repay by instalments spread over 25 years; the third was a class where they must, if spending capital, require it to be so recouped; even in the third class one does not find anything in the nature of what one may call running repairs.

The applicant company says that this revolution has been brought about by an alteration in 1948 of the Settled Land Act, 1925, by a kind of side-wind in the shape of a section of the Agricultural Holdings Act, 1948, and there is no doubt that it has made a great difference. Since March, 1948, the trustees have allowed certain moneys year by year to the company as the Duke's assign at his request and after satisfying themselves, no doubt, that they come within the statute. With those expenses I have nothing to do. The trustees have been advised, no doubt, that they are acting within their powers, and I have no cause to question anything that they have done; but the trustees declined to pay, as I say, for these repairs done before the Act of 1948 came into force on the ground, I understand, that when they were done there was no thought of recoupment and that it is not within the Act as it stands to recoup in respect of repairs executed before the Act came into force, and at a time when they were not legally payable out of capital.

This entails a certain amount of investigation of the two Acts, and I begin with the Settled Land Act, 1925, section 73 (1) of which provides: " Capital money arising under this Act, . . . shall, " when received, be . . . applied . . . in one . . . of the following " modes . . . (iii) In payment for any improvement authorized by " this Act . . . (iv) In payment as for an improvement authorized " by this Act of any money expended and costs incurred by a " landlord under or in pursuance of the Agricultural Holdings " Act, 1923, or any similar previous enactment, or under custom " or agreement or otherwise, in or about the execution of any " improvement comprised in Part I or Part II of the First " Schedule to the said Agricultural Holdings Act." When one looks at Part I and Part II of Sch. I to that Act, one does not find anything which would justify payment under this subsection of any of the repairs specified in the exhibit to which I have referred.

Section 75 of the Act of 1925 provides: "(1) Capital money "arising under this Act shall, in order to its being . . . applied "as aforesaid, be paid either to the trustees of the settlement "or into court . . . and shall be applied by the trustees, or under "the direction of the court, . . . accordingly. (2) The investment "or other application by the trustees shall be made according to "the direction of the tenant for life"; on that the applicant here relies to show that it is not a matter where the trustees have a discretion but that a direction from the tenant for life is mandatory and binding on them.

Under section 83 of the Act improvements are described, and they are set out in Sch. III to the Act. As I have mentioned before, they are divided into three categories according to their nature. When one looks at Sch. III one will see nothing in the nature of repairs, even in Part III, which are matters which must be recouped in any event out of income over an extended period. Under section 84 the old obligation on the tenant for life to introduce a scheme of improvements before putting his works in hand is abolished, and instead the trustees are exonerated if they act on a certificate of a surveyor certifying that the work comprised in the improvement has been properly executed and what amount is properly payable in respect thereof. Either they must have that, or they must have an order of the court directing or authorizing the trustees so to apply a specified portion; and one of the features in this case is, that there is certainly not at present a certificate on which the trustees could safely act under that section. Not unnaturally, the works having been done so long ago, nobody can now certify very much about them because of the lack of vouchers and the impossibility of seeing, eight years later, whether a tap has been re-washered or a water closet pipe renewed. It is, therefore, a matter for an order of the court if capital moneys are to be so applied.

Section 107 provides: "(1) A tenant for life or statutory owner "shall, in exercising any power under this Act, have regard to "the interests of all parties entitled under the settlement, and "shall, in relation to the exercise thereof by him, be deemed to "be in the position and to have the duties and liabilities of a "trustee for those parties." It follows from that that in giving a mandate to the trustees under section 75 the tenant for life is acting as trustee and must have regard as trustee not only to the interests of himself and his assign, but to the interests of the remainderman.

That was the position of the law when these works were done; and, as I say, nobody dreamed that there would ever be any application to pay for them out of capital, because it was quite obvious that they could not be so paid. But, in 1948, there was passed the Agricultural Holdings Act of that year, which was partly a consolidating Act and partly new law. By section 1 (2) "Agricultural land" means "land used for agriculture "which is so used for the purposes of a trade or business," and then there are a large number of matters which, of course, have nothing to do with the Settled Land Act. By section 81 (1): "Where under powers conferred by the Settled Land Act, 1925 ". . . capital money is applied in or about the execution of any "improvement specified in the Third Schedule to this Act no "provision shall be made for requiring the money or any part "thereof to be replaced. . . ." In other words, all money applied under the Settled Land Act by legislation made by reference to this Act is to be a Part I improvement, and there is to be no obligation to repay by instalments.

In section 94 (1) is a series of definitions, and among them this odd definition of what is called "Fixed equipment": "'Fixed equipment' includes any building or structure affixed "to land"—apparently not necessarily agricultural land—"and "any works on, in, over or under land, and also includes any"thing grown on land for a purpose other than use after "severance from the land, consumption of the thing grown or "of produce thereof, or amenity, and any reference to fixed equip"ment on land shall be construed accordingly." Section 96 (1): "References in any enactment, other than an enactment con"tained in the Agricultural Holdings Act, 1923, or the Agriculture "Act, 1947, to the First Schedule to the said Act of 1923, shall "be construed as follows, that is to say: (a) references to Part I, "II or III thereof shall be construed respectively as references "to the Third Schedule to this Act, to Part II of that Schedule "and to the Fourth Schedule to this Act. . . ."

That is a method whereby section 73 of the Settled Land Act is amended, and it is done in a very strange way. One must now read section 73 (1) (iv) as referring not to the Act of 1923 but to the Act of 1948. The resulting subsection reads: "In payment "as for an improvement authorized by this Act of any money "expended and costs incurred by a landlord under or in pursuance "of the Agricultural Holdings Act, 1948, or any similar previous "enactment," and so on, taking out the words at the end about Sch. I to the 1923 Act and substituting those about Sch. III to the 1948 Act.

When one looks at Sch. III to the Act of 1948 to find what are the new kinds of works or improvements which are to be, or which may be, recouped out of capital, one finds this: "Improvements begun on or after March 1, 1948, for which compensation is payable if consent of landlord or approval of the "Minister is obtained to their execution." "Landlord" here means the life tenant, and, consequently, if he is to get the money, of course, his consent is not required, but when one looks at the improvements they are in two parts. The first part is: "Improvements to which consent of landlord required," and they are comparatively permanent improvements to farming land. The second part is: "Improvements to which consent of landlord or approval of the Minister required," and that instances a number of comparatively large agricultural works of drainage and cultivation; but item 23 is in an altogether different category: "Repairs to fixed equipment, being equipment reasonably "required for the proper farming of the holding, other than "repairs which the tenant is under an obligation to carry out."

It is well known that in agricultural leases there was, at any rate up to 1948, a number of matters in respect of which neither the landlord nor the tenant was under an obligation and very often that gave rise to difficulties, e.g., because the tenant wanted the ceiling in the bedroom mended and he was under no obligation to do it, but his landlord would not do it either; and that was often a source of friction. Under the Act of 1948, as I understand it, the Minister has in fact produced a code in the form of a statutory instrument putting all those liabilities on one side of the line or the other, so that they are either the landlord's or the tenant's liability. So one must therefore find, in order that No. 23 of Part II of Sch. III shall apply, that the repairs are not repairs which the tenant is under an obligation to carry out. All the repairs in this case, so it is certified, were repairs which the tenant was not under an obligation to carry out; nor were they, it appears, repairs which the landlord was under an obligation to carry out. They were carried out by the company for the Duke and for other tenants of the company as, I suppose, by a good landlord in the course of good estate management, and were voluntarily done.

It will be observed that these new types of improvement, so far as the Agricultural Holdings Act, 1948, is concerned, must have been begun on or after March 1, 1948. That, of course, would exclude altogether all the repairs with which I am concerned; but it is said that all that is imported into the Settled Land Act, 1925, is the category of improvement in question and that the words "any improvement comprised in Parts I and II "of the Third Schedule to the Act" mean that the improvement must be "comprised" only in the sense that it is in the list of items.

For that there is the authority of *In re Lord Sherborne's Settled Estate.*[1] That was a case under the Act of 1925 and was concerned with improvements done before that Act came into force; but the language there was quite different; and one has here, in order to get these improvements in, to postulate that the costs were incurred under or in pursuance of the Agricultural Holdings Act, 1948. It was conceded after a time in the course of the argument that one could not say that these costs were incurred under or in pursuance of an Act which was not in existence when the money was expended and that, therefore, the applicant could not rely on that part of the section.

The following words are "or any similar previous enactment." The previous similar enactment was the Act of 1923, and it was not suggested that the repairs were within that. Then come the words "or under custom or agreement." It was not suggested either that there was a custom or an agreement that these repairs should be done, and the applicant company were eventually driven to the words "or otherwise." They contended that "or "otherwise" meant "or not"; in other words, that the whole of the words about the Agricultural Holdings Act or the previous enactment or custom or agreement were surplus, and that all that need be found was "money expended and costs incurred by "a landlord in or about the execution of any improvement com-"prised in the Schedule."

It is a strange thing to say that the whole of the words which are put in are purely a piece of trimming and quite unnecessary, and I approach that subject with a grave doubt about it. It seems to me that "or otherwise" in the ordinary course of construction must mean otherwise connected in some way or other with what had preceded it. The ejusdem generis rule should apply, and, if I was free so to construe it, I should construe it as "or in some other way analogous to custom, "agreement or a previous enactment." There may well be other ways which are missed; for instance, an Act of Parliament not being an Agricultural Holdings Act. I accept the view put forward by Mr. Goulding for the trustees that "otherwise" means "otherwise under some obligation"; and these repairs were not done, I am told, under any obligation whatsoever. Consequently, if I were free to do so, I should hold that these repairs, being done before the change of the law came into force in March, 1948, did not come within section 73 (1) (iv) of the Settled Land Act at all.

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[1] [1929] Ch. 345.

It is said, however, that I am precluded from so holding by a decision of Vaisey J.; that I will discuss in a moment, but, assuming that I am wrong so far, the question will arise whether the trustees had any discretion, and it was said that the same decision obliged me to say that they had no discretion. I am not sure that that is so. That decision does indeed say that they are bound to act on the direction of the tenant for life, but Vaisey J. did in his judgment hold himself free to limit the time over which the application might extend, and that must have been, as I understand it, on the footing that there was a discretion. It is said by the applicant here that there is no limit to the time to which an application may go back. I suppose 1925 is a limit, but at any rate to that extent a demand for recoupment may go back as far as is desirable.

Of course, the consequences are very serious. When things of this sort were done so many years ago, it is really impossible to tell whether the money was spent or not; and it seems to me that, if there be a discretion, the trustees would rightly say that such repairs ought not to be met out of capital on the ground, many times relied on for that purpose, that they were not done by the tenant for life in the faith that they would be so repaid; so that, as they had been done voluntarily and out of the tenant for life's own pocket, discretion ought not to be exercised in his favour. In *In re Borough Court Estate*,[2] it was held: "that, as the applicant must at the time have expected "himself to pay the sums spent on improvements which after "1925 came within Part II of the Third Schedule to the Settled "Land Act, 1925, the jurisdiction ought not to be exercised." Therefore, if it is a discretionary jurisdiction, it seems to me that it is one that ought not to be exercised.

It is said that it is not discretionary because the Duke has, in exercising his powers under section 75, directed the trustees to apply the capital money in this way; but, as I have already pointed out, the Duke, in giving that direction, was acting as a trustee for all parties, and I do not see how he can merely for his own convenience properly give a direction which puts money into his own pocket and the pockets of his assign in respect of farmhouses and other property which he is himself occupying, the repairs to which would be no good whatever to the inheritance. It seems to me that those are not directions which he can properly give as a trustee. He can ask the trustees whether they will pay, and they must have a discretion whether they will or not; and, in my judgment, if that applied, they ought to decline, as they have done. I would come to the conclusion in this particular case, if the repairs be within the Schedule, and if the Duke purports to direct them to be done, that he is allowing his duty as a trustee, he having a duty towards the remainderman, to conflict with his interest, which is to have them done at capital expense in order that the tenant of the farm may be better off. I therefore think that it is not a case in which he can properly give such a direction.

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[2] [1932] 2 Ch. 39, 40.

The case with which I was faced, and quite properly, was *In re Duke of Northumberland, decd.*,[3] a decision of Vaisey J., which it was said that I ought to follow. In that case the tenant for life had been spending on repairs since 1945 moneys in excess of the rents received, and applied to have the moneys recouped. Some of the repairs only, as I understand it, could be charged as improvements under section 96 of the Agricultural Holdings Act, 1948, and Sch. III to that Act, but not all of them. Some of them had been done before March 1, 1948, and some of them after; and Vaisey J. was certainly asked whether those done before that date did come within the Act, so that the point was, I think, taken. I should say that Vaisey J. held that it was possible to go back to January, 1945, but he did not deal at all with this question whether they were repairs done under or in pursuance of the Act.

The headnote states: "The date of January 1, 1945, was "applicable, because (a) the evidence did not cover any earlier "period, and (b) the recoupment of expenditure made more than "six years previously appeared to be inconsistent with the "principles laid down in *In re Borough Court Estate.*[4]" The point taken here, therefore, does not appear in the headnote at all; but it was also held, secondly: "that the trustees must

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[3] [1951] Ch. 202–8.

[4] [1932] 2 Ch. 39.

"comply with the directions of the tenant for life on being "satisfied that the application of capital money was or would "be within the relevant provisions of the Settled Land Act, "1925, and consistent with the present judgment." Therefore, he did hold that improvements going back to 1945, and, apparently, although it does not appear very clearly, justified only under Sch. III to the Act of 1948, were nevertheless within the duty of the trustees to recoup if so directed by the tenant for life.

In argument, Mr. Goulding said[5]: ". . . on March 1, 1948, "a new list of improvements came into force, and the old list "is not preserved for any transitional purposes. It cannot have "been intended that capital money should not be applied in "repayment of past expenditure. The date has relevance, not "to the expenditure of the money by the tenant for life, but to "the recoupment of the money by the trustees." That point, apparently, was not met by counsel in answer.

Vaisey J. reserved his judgment, and began by reading part of section 73 (1) (iv) of the Settled Land Act in this way[6]: "Turning to the relevant statutory provisions, I observe first "that capital money is applicable in payment under section 73 "(1) (iv), of the Settled Land Act, 1925, 'in payment as for an "'improvement authorized by this Act of any money expended "'and costs incurred by a landlord under or in pursuance of the "'Agricultural Holdings Act, 1923.'" He does not go on with the "custom or otherwise" part of the section at all. He then mentions that for "1923" he must read "1948," and assumes in his judgment that the repairs before him were repairs done under or in pursuance of the Act of 1948.

With all deference, I think that that was perhaps a slip on his part, because, as I understand from Mr. Goulding, who argued the case, he had not suggested that he could succeed on that footing but only under the words "or otherwise," and Vaisey J., in his judgment, nowhere deals with the point about the words "or "otherwise," and assumes that all these repairs were done under or in pursuance of the Act of 1948. A good many of them were, because a good many of them were after March 1, 1948. Vaisey J. had a number of other difficult questions to decide, and it is not surprising that, taking them all together as he did, he, after criticisms which I heartily endorse of this kind of method of legislating by reference, says this[7]: ". . . applying as best I

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[5] [1951] Ch. 202, 205, 206.

[6] [1951] Ch. 206.

[7] [1951] Ch. 208.

"can the law as it seems to me to emerge from this welter of "confused and confusing enactments, I will answer the question "raised by the summons as follows: under paragraphs 1, 2 and 3 "of the summons"—that is to say, both in respect of the period before and the period after March 1, 1948, which he combines—"I will declare that under the enactments mentioned in paragraph 1"—that included the Act of 1948—"the plaintiffs, as "trustees . . . are entitled to apply capital moneys of the said "settlement in payment (as for an improvement authorized by "the Settled Land Act, 1925) of any money expended or to be "expended and costs incurred or to be incurred by the tenant "for life under the said settlement in or about the execution on "or after January 1, 1945, of such repairs as are specified in "paragraph 23 of Part II of Sch. III to the Act of 1948 in "relation to agricultural land. . . ."

It is quite true that that is an authority for recoupment of expenditure before 1948; but, as I say, that was one of a number of controversial points, and it seems to me that Vaisey J. overlooked that particular detail. It is only one of a number of other matters which he had to decide, and I do not think that I am bound to follow it, though in any ordinary case, of course, I should follow Vaisey J., he being very learned in this branch of the law. This seems a case of bonus dormitat Homerus.

As to the other point with which he dealt—namely, that under section 75—it does not appear that section 107 was mentioned, nor did the judge have before him the point which is before me, namely, that the tenant for life, in giving the direction, was in effect putting money into his own pocket. So far as I know, these were not properties in hand. These were moneys spent by the tenant for life on the estate, although some of the properties, no doubt, were not held under a business tenancy; some of them were cottages occupied by employees. The matter was not considered in that sort of way at all. Where, of course, the period after 1948 is concerned, the tenant for life may properly give the direction, because the statute contemplates that he shall do so, and because the expenditure no doubt is incurred in the first place in reliance on that being done; but in a case where the expenditure has already been made not in reliance on that, it does not seem to me that the tenant for life is entitled, as an afterthought, to say: "Now that the law has been changed, I do not see why "I should not have the money out of capital."

Consequently, in my judgment, this application ought to be refused, and the trustees ought not to apply the capital money as requested in paying for these particular improvements. This, however, is a matter which the Duke's advisers were well entitled to bring before the court, and I think that it will be no injustice if I order the costs of all parties to be taxed and paid as between solicitor and client out of the capital of the settled estate.

Order accordingly.

Solicitors: *Taylor & Humbert; J. R. H. Chisholm.*

K. R. A. H.

C. A.

1953
July 4, 6, 30.

Evershed M.R., Birkett and Romer L.JJ.

In re ALLEN, DECD. FAITH *v.* ALLEN.

[1952 A. 1301.]

Will—Condition precedent or qualification—Uncertainty—Provision that devisee "shall be a member of the Church of England and an "adherent to the doctrine of that Church"—Validity.

A testator devised certain freeholds, after life interests, to the eldest of the sons of his nephew F "who shall be a member of the "Church of England and an adherent to the doctrine of that "Church," with a gift over. Vaisey J. held that, both singly and in conjunction, the expressions "a member of the Church of "England," and "an adherent to the doctrine of that Church" were void for uncertainty. On appeal:—

Held (Romer L.J. dissenting), that the gift was not void for uncertainty. The formula was not a condition subsequent, where the clarity had to be such that the exact event which would cause the gift to be divested had to be apparent from the outset. This was a condition precedent, or a qualification and, to satisfy it, it was not necessary that its scope should be capable of exact definition. All that a claimant had to show was that he, at least, was within the requirement. Membership of the Church of England comprised wide differences of degree, but it was an intelligible qualification of the class of intended beneficiaries, and though it might be difficult to say of some persons whether they were or were not members, that did not of necessity render it impossible for a particular individual to establish that he was a member, and he ought not to be debarred from attempting to show that he fulfilled the qualification. Similarly, the second expression "an adherent to the "doctrine of the Church of England," though involving questions of degree which would defeat a condition subsequent, was not, as a qualification, void for uncertainty. The test of adherence to the doctrines of the Church of England was directed to ensuring a conscientious and sincere attachment to the general teaching of that

Church as distinct from any other, and on the ordinary meaning of the expression it was capable of reasonable application.

Romer L.J. (dissenting) held that, though the requirement of membership of the Church of England did not render the devise void for uncertainty, that of adherence "to the doctrine" of that Church did. Both the doctrine and the degree of adherence were uncertain and unsusceptible of ascertainable meaning. Nor was it clear what was meant by "an adherent" to a religious teaching or faith.

In re Perry Almshouses [1898] 1 Ch. 391; 14 T.L.R. 232 applied.

Clayton v. *Ramsden* [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16 and *In re Lockie* [1945] N.Z.L.R. 230 distinguished.

In re Biggs [1945] N.Z.L.R. 303 considered.

Decision of Vaisey J. [1953] Ch. 116; [1953] 2 W.L.R. 244; [1953] 1 All E.R. 308 reversed.

APPEAL from Vaisey J.[1]

The following statement of the facts is taken from the judgment of Evershed M.R.: Henry George Allen K.C., by a third codicil dated November 10, 1907, to his will made in the previous year, gave and devised his dwelling-house "Paskeston," in Pembrokeshire, and certain other property, subject to certain prior limited interests which determined in 1952, "to the eldest of the "sons of" his nephew Francis S. Allen "who shall be a member "of the Church of England and an adherent to the doctrine of "that Church." The codicil further provided that "in case there "shall be no son of the said Francis . . . who shall be a member "of the Church of England or an adherent to the doctrines" (sic) "of that Church I devise and bequeath the said dwelling-"house and other property" in the events which have happened to Wilfred Baugh Allen, in the codicil called Judge Wilfred Allen, and his heirs. The testator died in November, 1908.

The present proceedings were begun by way of originating summons, one of the present personal representatives of the testator being the plaintiff. The defendants, in addition to a life tenant of the premises in question who had since died, were the personal representatives of two of the sons of Francis S. Allen, his third son, the personal representative of Wilfred Baugh Allen and the personal representative of the testator's heir-at-law. The first question asked by the summons was whether the devise in favour of the eldest of the sons of Francis S. Allen, already recited, was valid or was void for uncertainty. The second and third questions arose only upon an answer being given to the first in favour of the validity of the devise. The fourth question asked whether in the event that the devise was held void, the subject-matter of the devise devolved upon Wilfred Baugh Allen or his estate by virtue of the later direction in the codicil or devolved as upon the testator's intestacy. The remaining questions related to matters not relevant to the appeal.

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[1] [1953] Ch. 116; [1953] 2 W.L.R. 244; [1953] 1 All E.R. 308.

Vaisey J. by an order of March 4, 1953, declared in answer to the first question that the devise in favour of the eldest of the sons of Francis S. Allen was void for uncertainty. He answered the fourth question in a sense favourable to the personal representatives of Wilfred Baugh Allen. In the view which Vaisey J. took nothing turned on the difference in language in the two references in the codicil to membership of the Church of England and adherence to its doctrine or doctrines; for Vaisey J. held both references to be too uncertain to be capable of being effective.

The personal representative of the eldest of the sons of Francis Allen (but neither of her co-defendants in a similar interest) appealed against the answer given by Vaisey J. to the first question in the summons, the respondents being the plaintiff, and the personal representatives of Wilfred Baugh Allen. The representative of the testator's heir-at-law did not appeal and was not represented.

J. P. Hunter-Brown for Maria Eileen Viscomtesse de Serrant, personal representative of the eldest son of Francis Allen. In *In re Perry Almhouses* [2] the court had no difficulty in deciding that the meaning of a "member of the Church of England" was sufficiently clear for the purpose of qualifying for entry to an almshouse, and if the meaning was clear there, it must be clear also for the purpose of qualifying as a beneficiary under a will. The meaning of the second qualification, "adherent to the doctrine "of the Church of England," is admittedly more difficult to determine than the first. The testator intended to ensure that the devisee had a conscientious attachment to the doctrine of that Church which went beyond membership or mere outward conformity. In *In re Perry Almshouses* [2] a course of conduct was laid down which would probably have achieved the same standard, though there the attachment was to the Church of England rather than to the doctrine. That case shows, however, that the test of adherence is a question which the court can and will answer.

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[2] [1898] 1 Ch. 391; 14 T.L.R. 232; affirmed [1899] 1 Ch. 21.

The degree of certainty needed for a qualification such as this is not the same as that required in the case of a condition subsequent, where it must be apparent from the outset, both to the court and to the beneficiary, what is the event which will cause the gift to divest. If this were a condition subsequent it would be difficult, in view of *Clayton* v. *Ramsden*,[3] to maintain that it was not void for uncertainty. Inquiry may be needed before it is possible to decide whether a qualification is satisfied, but that does not mean that the qualification is void for uncertainty. If the applicability of a qualification is ascertainable on inquiry in relation to a particular beneficiary the gift is good. For example, if in *Clayton* v. *Ramsden* [3] the gift had been to the husband if he had satisfied certain qualifications the court could, on inquiry, have decided whether or not he had satisfied the test. That would have been quite different from the actual provision in *Clayton* v. *Ramsden* [3] that the gift was to be divested if the donee should marry someone not "of Jewish parentage," for until the marriage had taken place the donee would not know what test the court would apply to determine what was meant by that expression. Equity always leans strongly against divesting a vested gift and, therefore, unless the event is one which can be defined in advance (and the House of Lords said in *Clayton* v. *Ramsden* [3] that "Jewish parentage" could not be so defined) the condition will be bad.

There are many questions which are capable of being answered on inquiry in a given case but in relation to which it is impossible to prescribe in advance the exact test which would apply to any person to determine whether he came within the specified group or qualification. It is submitted that both of the qualifications in the present case are valid in this sense, that if, for example, the eldest son of Francis Allen had, at the relevant date, happened to be the Archbishop of Canterbury, it would have been difficult for the trustees to have contended that they did not know whether he was a member of the Church of England or an adherent to the doctrine of that Church. If, however, the expression had been in a condition subsequent, it might have been difficult to say in advance, for example, how far any church member could backslide before he could no longer be described as a "member" and be deprived of the gift. It is submitted that the testator meant the beneficiary to be a member of the Church of England and to accept the distinctive teaching of that Church. As a matter of common sense it is possible to answer the questions as to membership, adherence and doctrine, and a potential devisee ought to be given the opportunity of proving whether he can satisfy these qualifications.

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[3] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16.

The New Zealand cases of *In re Lockie* [4] and *In re Biggs* [5] are not binding on this court; see also *Attorney-General* v. *Calvert*.[6]

N. P. M. Elles for the personal representatives of Wilfred Baugh Allen. The qualification, whether a condition precedent or a condition subsequent, is void in both limbs, both as to the test of outward conformity, described as "membership," and as to the test of sincere belief. There is no technical definition of "membership" of the Church of England. In the Church Commissioners Measure, No. 2, 1947, and the Clerical Subscription Act, 1865, the commissioners and the clergy respectively are required to declare that they are "members," but the meaning of that expression is not given and the test is conformity by declaration. But here a mere declaration would not, it is submitted, be sufficient to satisfy the requirement that the devisee "is" a member, and though on inquiry it might be possible to say of certain persons, such as the Archbishop of Canterbury, that they were undoubtedly members, it is difficult to see where the line is to be drawn between members and non-members.

It is even more difficult to decide what is an "adherent to the "doctrine of the Church of England," for there is no available definition of the "doctrine." Section 1 of the Clerical Subscription Act, 1865, provides what might be regarded as a definition so far as clergymen are concerned, but no layman is required to subscribe to the 39 articles. The test submitted on behalf of the appellant involves rewriting the will of the testator, for he did not say that the devisee should adhere to the peculiar teachings of the Church of England or that he should adhere "generally." Further, even if it were possible to define the doctrines, religious belief is beyond the capacity of the court to ascertain and, even if it could be ascertained, the will does not specify what degree of adherence is required: see *Sifton* v. *Sifton*.[7]

Clayton v. *Ramsden*,[8] *In re Lockie* [9] and *In re Biggs* [10] are in point. In *In re Lockie* [11] the clause was a condition subsequent, but in *In re Biggs* [12] the nature of the clause was not decided, and Callan J. indicated that this was not a matter for inquiry but that the court had to determine whether the condition (irrespective of whether it was a condition precedent or subsequent) was enforceable. Even if an inquiry were held, *Clayton* v. *Ramsden* [13] shows that the question of adherence to a faith cannot be answered. *In re Perry Almshouses* [14] is distinguishable, for the question there was whether the gift was charitable, and the question of uncertainty was not taken.

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[4] [1945] N.Z.L.R. 230.
[5] [1945] N.Z.L.R. 303.
[6] (1857) 23 Beav. 248.
[7] [1938] A.C. 656.
[8] [1943] A.C. 320.
[9] [1945] N.Z.L.R. 230.
[10] [1945] N.Z.L.R. 303.
[11] [1945] N.Z.L.R. 230.
[12] [1945] N.Z.L.R. 303.

Both the conditions imposed by the testator are void, but even if only one is void the gift will fail.

R. O. Wilberforce, for the plaintiff, one of the personal representatives of the testator, adopted the argument of *N. P. M. Elles*, and referred also to *In re Tegg.*[15]

J. P. Hunter-Brown in reply. *In re Biggs* [16] is not binding and it is distinguishable, for it was not dealing with a condition precedent. The distinction between a condition precedent and a condition subsequent is vital: *Clayton* v. *Ramsden* [17]; *Sifton* v. *Sifton.*[18] The onus is of course on the claimant, but on a commonsense test he may be able to satisfy the condition and he ought to be given the chance to do so.

Cur. adv. vult.

July 30. EVERSHED M.R., in a written judgment, after stating the facts as set out above, referred to the judgment of Vaisey J.[1] and continued: At the beginning of his judgment, containing a considerable analysis of the significance of membership of the Church of England and of the character of the doctrines of that Church (matters upon which the judge has notably great knowledge and experience) Vaisey J. referred to the relevant formula as a " description, qualification or condition "; but it is I think clear from later passages [2] that he regarded it as either a condition precedent or a qualification distinct in either case from a condition subsequent. The judge was, in my opinion, plainly right in his view that the formula here in question is not a condition subsequent. In my judgment the effect of such a formula as part of a condition subsequent differs from its effect in a condition precedent or as part of a qualification or limitation. I understand from the passage in his judgment referring to

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[13] [1943] A.C. 320.
[14] [1898] 1 Ch. 391.
[15] [1936] 2 All E.R. 878.
[16] [1945] N.Z.L.R. 303.
[17] [1943] A.C. 320, 329.
[18] [1938] A.C. 656.
[1] [1953] Ch. 116; [1953] 2 W.L.R. 244; [1953] 1 All E.R. 308.
[2] [1953] Ch. 116, 121.

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Clayton v. *Ramsden*[3] that the judge was also of that opinion, and I agree with him in differing from the New Zealand case of *In re Biggs*[4] in so far as the judge in that case (Callan J.) expressed the contrary view.

A condition subsequent operates to divest or determine a gift or estate previously or otherwise vested; so that if the condition be void the gift or estate remains. It has been long established that the courts (which are inclined against the divesting of gifts or estates already vested) will hold a condition subsequent void if its terms are such that (apart from mere difficulties of construction of the language or of the ascertainment of the facts) it cannot be clearly known in advance or from the beginning what are the circumstances the happening of which will cause the divesting or determination of the gift or estate. The strictness of the special rule as to conditions subsequent was the basis of all the opinions of the noble Lords in *Clayton* v. *Ramsden* and was thus expressed by Lord Russell of Killowen[5]: "The courts have "always insisted that conditions of defeasance, in order to be "valid, should be so framed that the persons affected (or the "court, if they seek its guidance) can from the outset know with "certainty the exact event on the happening of which their "interests are to be divested. The principle was enunciated "many years ago by Lord Cranworth in *Clavering* v. *Ellison* in "the following words[6]: 'Where a vested estate is to be defeated "'by a condition on a contingency that is to happen afterwards, "'that condition must be such that the court can see from the "'beginning, precisely and distinctly, upon the happening of "'what event it was that the preceding vested estate was to "'determine.'" I feel, therefore, no doubt that if the present formula constituted a condition subsequent it would, for the reasons fully set out by Vaisey J., be held to be void—its second part falls clearly, I think, within the reasoning and language of Lord Russell and Lord Romer in *Clayton* v. *Ramsden*[7] to which I shall later again refer.

It appears that the avoidance of a condition precedent may or may not (in the case of personalty) carry with it the avoidance of the gift according as the condition is the sole motive of the gift (see *In re Piper*[8]). In the present case, if the formula constitutes a condition precedent, I will assume that failure to satisfy the condition will involve failure to take the benefit of the devise. And the same result is equally (if not more) clear if the formula is not a condition at all but part of the description of the devisee (as though it were to the eldest son who should have red hair); in other words, is a limitation or qualification, as I think it is (see, for example, *per* Tomlin J. in *In re Wilkinson*,[9] and *In re Wolfe*,[10] decided by Harman J. in May of this year).

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[3] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16.

[4] [1945] N.Z.L.R. 303.

[5] [1943] A.C. 320, 326.

[6] (1859) 7 H.L.C. 707, 725.

[7] [1943] A.C. 320, 329, 334.

[8] (1946) 62 T.L.R. 618; [1946] 2 All E.R. 503.

In any case, and whether the formula be a condition precedent or a qualification, it seems to me that no such general or academic test is called for as a condition subsequent requires. All that the claiming devisee has to do is at the relevant date to establish, if he can, that he satisfies the condition or qualification whatever be the appropriate test. If the formula is such as to involve questions of degree (as, prima facie, is implicit in any requirement of " adherence " or " attachment " to a particular faith or creed), the uncertainty of the test contemplated may well invalidate the formula as a condition subsequent but will not, in my judgment, necessarily do so in the case of a condition precedent; for if the claimant be able to satisfy any, or at least any reasonable test, is he disentitled to the benefit of the gift? The essential difference which, I think, exists, and to which I have alluded, was well illustrated by Mr. Hunter-Brown in the course of argument. A condition subsequent divesting an estate vested in A if A at some relevant date should not be a tall man would, as it seems to me, be held void for uncertainty. For tallness being a matter of degree, by what standard is it, for the supposed purposes, to be judged? If " tallness " is achieved by being above the " average " height, then what average is contemplated? The average of A's town or neighbourhood, the average of Englishmen, the average of all mankind? And would a man in height above the average, say of all Englishmen, by however small a fraction of an inch, be called " tall " in any ordinary sense? But questions of this kind, which might be fatal to the supposed formula as a condition subsequent, might have no application in the case of a condition precedent or qualification; for a claimant who was 6ft. 6ins. tall might fairly say that he satisfied the testator's requirement judged by any reasonable standard.

It may well be that, in a case such as I have supposed, very difficult questions might arise, for example, if the claimant proved that he was a man very slightly above the average height of Englishmen. The court would then have to decide on the facts and on the construction of the bequest (for example, that by "tall" the testator had meant "lofty") whether the claimant satisfied the requirements of the testator and had established his claim to the gift. But I am not persuaded that where a formula constitutes a condition precedent or a qualification it is right for the court to declare the condition or qualification void for uncertainty so as thereby to defeat all possible claimants to the gift unless the terms of the condition or qualification are such that it is impossible to give them any meaning at all, or such that they involve repugnancies or inconsistencies in the possible tests which they postulate, as distinct, for example, from mere problems of degree.

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[9] [1926] Ch. 842.

[10] [1953] 1 W.L.R. 1211; [1953] 2 All E.R. 697.

If I have correctly stated the relevant principles I now try to apply them to the formula here in question. And as regards the qualification of membership of the Church of England, it seems to me that, notwithstanding the differences in degree which the language contemplates, they do not suffice to render void for uncertainty this part of a formula regarded as a qualification. Thus, if it so happened that the eldest of the sons of Francis Allen was at the relevant date (whatever that date may be) a prelate or dignitary of the Church, he would fairly claim to satisfy any reasonable test implicit in the words—the contrary view might at least, to my mind, be said to shock common sense. Indeed, I venture on my part to think that if membership of the Church of England be regarded as a qualification, the language of Stirling J. in *In re Perry Almshouses*[11] is fairly appropriate: "Whatever difficulty there may be in giving a strict legal definition of what constitutes membership of the Church of England, "I think that a person who has been baptized, has been confirmed, or is ready and desirous to be confirmed, and is an actual "communicant, does hold the status of a member of that church, "and would be ordinarily regarded and spoken of as such." For if a trust for the benefit of members of the Church of England be a good charitable trust, then members of the Church of England must be a definable class or section of the public and membership of the Church an intelligible qualification for membership of the class of possible beneficiaries. Upon this part of the case I respectfully adopt the reasoning of Romer L.J., whose judgment I have had the advantage of reading in advance.

The second part of the formula is, however, in my view very much more difficult. The testator clearly intended that the devisee should not only outwardly " belong to " the Church of England, but that his membership should be in some sense conscientious as well. So much it is easy to state. But the reference to " adherence " and to the " doctrine " of the Church raise inevitably the problems of uncertainty and degree to which Lord Russell and Lord Romer drew attention in their opinions in *Clayton* v. *Ramsden* [12] already cited, which are illustrated in the judgment of Vaisey J., and which would clearly, in my view, be fatal in any event to the validity of the formula if it were part of the terms of a condition subsequent. But are the words when used as part of a qualification so uncertain as necessarily to vitiate the gift? With considerable hesitation I have come to the conclusion that they are not. On the evidence so far before the court it does not seem to me that the words are shown to involve any insoluble inconsistency, or that they are incapable of any reasonably clear meaning or any sensible definition at all—as might, for example, be the case if the devisee were required to be " a pure blooded Englishman." If the supposition again be made that the eldest of the sons of Francis Allen were a prelate or dignitary of the Church of England, it seems to me liable to offend against common sense if the court were compelled to say that he was none the less incapable of taking because he was incapable of qualifying as " an adherent of the doctrine " of the Church.

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[11] [1898] 1 Ch. 391, 400; 14 T.L.R. 232.

No case was cited to us—nor have I been able to discover a case—in which the validity of a comparable formula, constituting a condition precedent or a qualification, has been considered by the court. In *Patton* v. *Toronto General Trusts Corporation* [13] part of a condition precedent to enjoyment of an annuity was that the annuitant should " be of the Lutheran religion," and its validity was assumed (and acted upon) by the Judicial Committee of the Privy Council in a judgment delivered by Lord Blanesburgh. I have already expressed my view that all the speeches in *Clayton* v. *Ramsden* [14] proceeded from the basis that the condition there under review was a condition subsequent requiring that the persons affected (or the court) should " from " the outset know with certainty the exact event on the happen- " ing of which their interests " were to be divested (*per* Lord Russell [15]). It is, therefore, in that context that Lord Russell's later sentence should, in my judgment, be interpreted [15]: " The

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[12] [1943] A.C. 320.

[13] [1930] A.C. 629.

[14] [1943] A.C. 320.

[15] Ibid. 326, 329.

"requirement that a person shall be of Jewish faith seems "to me too vague to enable it to be said with certainty that a "particular individual complies with the requirement." Lord Romer in the same case said [16]: "The Court of Appeal answered "this question," that is, whether a man was of the Jewish faith, "by saying that whether a man was or was not of the Jewish "faith was a mere question of fact to be determined on "evidence . . . I should agree entirely with the Court of Appeal ". . . if only I knew what was the meaning of the words 'of the "'Jewish faith.' Until I know that I do not know to what "the evidence is to be directed." But this language must again, in my view, be interpreted in its application to a provision for forfeiture. In his next sentence Lord Romer stated: "There "are, of course, an enormous number of people who accept every "tenet of, and observe every rule of practice and conduct "prescribed by, the Jewish religion." If this be so, as I assume that it is, would not such persons be fairly described on any view as "adherents to the doctrine of the Jewish faith"? And if such adherence were the qualification required for beneficiaries under a trust, would not they at least be entitled to qualify?

Of the other cases referred to by Vaisey J., both the decision of Farwell J. in *In re Tegg*,[17] and that of Smith J. in *In re Lockie* [18] related to conditions subsequent. The second New Zealand case of *In re Biggs* [19] may, on the other hand, have been a case of a condition precedent, the relevant words of which were, moreover, comparable to those in the present case. The relevant words of the gift were "To stand possessed of the "residue . . . upon trust for my . . . grandson . . . absolutely "should he survive me and attain the age of 25 years and at "the date of my death or the attainment by him of the age of "25 years whichever last occurs be an adherent of the Church "of the Province of New Zealand otherwise known as the "Church of England." I have already stated my view that (with all respect to Callan J.) the principles applicable to a condition precedent differ from those applicable to a condition subsequent. Moreover, on the facts of the case the result was the same if the condition was void for uncertainty whether it was a condition subsequent or a condition precedent; for if the former, the grandson took free from the condition, and if the latter, he took as the testatrix' sole next-of-kin. Callan J.

[16] [1913] A.C. 334.

[17] [1936] 2 All E.R. 878.

[18] [1945] N.Z.L.R. 230.

[19] [1945] N.Z.L.R. 303.

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found it, therefore, unnecessary to decide whether the condition was precedent or subsequent.

In my view, therefore, it would not be right to say that the appellant could not seek to establish as a matter of fact that Reginald Seymour Allen was, at whatever may be held to be the relevant date, an adherent of the doctrine of the Church. It may be that the appellant will fail in her proof, for the onus will be upon her. And the court will have to reach some conclusion at least as to the test to be applied. Mr. Hunter-Brown suggested in argument that an adherent of the doctrine of the Church of England meant "one who accepts *in general* the "teaching of the Church of England as opposed to the teaching "of any other Church or denomination." Although we were not referred to the detail of the evidence, I understand that R. S. Allen's mother was a Roman Catholic and that he was himself, at any rate at one time, a member of the Roman Catholic Church. It does not appear (though it would prima facie be relevant and admissible if it were the fact) that at the date of the codicil the testator was aware of Mrs. Francis Allen's faith and that he held anti-Catholic views. If so, proof that R. S. Allen had genuinely forsaken the Catholic Church for the Church of England might be held to amount to substantial compliance with the requirement and therefore to satisfy the qualification. It also seems to me that the required degree of "adherence" would be that appropriate to a lay member of the Church rather than to a priest.

My present inclination, on the facts now before the court, is to think that by his double qualification the testator intended that at the material date the designated beneficiary should not only have (formally) joined the Church of England and, therefore, (formally) left any other Church or denomination to which he had belonged; but that he should also have to prove to the satisfaction of the trustees (or, if necessary, the court) that his membership of the Church was conscientious; that is to say, it at least involved, if he had left some other Church or denomination, that he had, in general or substantially renounced the distinct doctrines or tenets of that other Church in favour of the distinct doctrines or tenets of the Church of England. But unless I am wrong in the principles which I have sought to apply, it is not, I think, useful or possible, to attempt further exposition in the absence of the evidence. If the appellant desires to prosecute her claim she must place such evidence of the relevant facts as she can before the court, and the court must then decide whether, on the facts so proved, R. S. Allen can fairly be said to have substantially complied with the requirement which the testator intended to impose.

I think that it follows from what I have said that had the language of the condition in *Clayton* v. *Ramsden*[20] relating to the Jewish faith formed part of a qualification or condition precedent, it is probable (at least) that the decision of the House would have been in a sense opposite to that in the case which was decided. It follows also, I think, that the principles applicable to a condition precedent must be taken materially to differ from those applicable to a condition subsequent (and it is not always easy to determine whether a condition is of the one kind or the other). Right or wrong, I accept these consequences. And I am able to do so with somewhat less misgiving for these reasons: first, because, on the matter of principle, I think that Vaisey J. was also of that opinion; second, because in the case of a will it is in general the function and duty of a court to construe the testator's language with reasonable liberality and to try, if it can, to give sensible effect to the intention he has expressed. To this general rule conditions subsequent seem to me to be an exception. The requirement that it must be known with certainty from the outset what are the exact events which will cause a forfeiture or divesting (to borrow once again the language of Lord Russell) seems to me to be founded on principles well established by authority but peculiarly applicable to provisions for forfeiting or divesting an estate or interest previously conferred.

For these reasons I think that the appeal should be allowed.

BIRKETT L.J. If the question which calls for an answer in this appeal were being asked for the first time in the courts, I should have thought that the answer could be given without very much doubt or hesitation. "Is this man a member of the "Church of England?" would seem to me to be a question which could be answered quite simply "Yes" or "No." It would certainly be surprising to be met with the reply that the words were so vague and uncertain that no reply could be given. Similarly, if the question were asked: "Is this man an adherent "to the doctrine of the Church of England?" I should have thought that it would be possible to answer the question with equal ease.

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[20] [1943] A.C. 320.

It is true that the apparent simplicity of the questions may be made to look extremely deceptive by saying: "It all depends "upon what you mean by 'member' or 'adherent' or "doctrine'," and widely varying definitions of the words may be given, so that what at first sight seemed simple and quite straightforward, becomes clouded and difficult and obscure. But when a testator uses the words "a member of the Church of "England," he must not be assumed to be speaking as a learned theologian or an ecclesiastical historian, with special meanings in his mind, or with refinements and reservations. He must be assumed to be an ordinary man using ordinary language. Millions of people today use precisely the same words when they say with complete assurance: "I am a member of the Church of "England." The words have a clear and definite meaning and are understood to mean exactly what they say. If those people are called upon to make some formal acknowledgment of the religion they profess, they reply with the same confident assurance: "Church of England."

If a poll were taken in this country and the question asked was: "What is your religion?", millions of people would answer: "Church of England," just as others would answer, "Methodist," "Baptist," "Congregationalist," "Member of "the Society of Friends," "Roman Catholic," or some other designation. The word "religion" would be used here in its meaning of some particular system of faith and worship, in distinction to the wider and truer meaning of religion as the recognition of some higher power in the world, and the acceptance of the standards of spiritual and practical life that this recognition involves.

Almshouses for aged poor persons who are members of the Church of England have long been established and recognized; scholarships for sons of members of the Church of England have presented no difficulty; and instances of this kind could be multiplied. In a word, in practice, the use of the words "a "member of the Church of England" has long been understood as conveying a clear and definite meaning.

To say, therefore, as it is said in the present appeal, that when a testator speaks of a "member of the Church of England" he has used words that are not capable of any certain meaning, is at first sight extremely surprising. It is no doubt true that if the persons who confidently assert that they are members of the Church of England were asked to define what they regard as the qualifications for membership, they would make answers that differed widely from each other. Some would say that they had been brought up in the Church of England from their infancy, and had never given allegiance to any other Church or denomination; some would rely on the fact that they attended the services of the Church with regularity and never attended any other; some would rely on having been baptized in the Parish Church, on having been confirmed, and on being regular communicants at the Church; but in one way or another, they would all unite in saying that they were members of the Church of England. So far as I know, they would all be members of the Church of England, and in practice certainly, they would all be so regarded.

I am not unmindful of the fact that it was this wide diversity of view which led Vaisey J. to say [20a]: "There are so many views "as to what 'member of the Church of England' means that "I should have thought that those words, even alone, were quite "incapable of having attached to them a definite meaning." It might, perhaps, be said that there are so many ways of becoming a member of the Church of England that uniformity is not to be expected; but in the absence of any precise and rigid test of membership, it seems to me that the words "a member of the "Church of England" have a definite meaning. Quite apart from the clergy, to whom perhaps different considerations apply, does anybody doubt that distinguished and devout laymen, who proclaim themselves to be members of the Church of England, could not be allowed to show why they were members of the Church of England?

Similarly, when a man says: "I am an adherent to the "doctrine of the Church of England," I should have thought that he was only saying what millions of people who attend the services of the Church, recite the creeds, use the Book of Common Prayer, and sing the hymns of the Church, and gather from these things the distinctive teaching of the Church of England, say with confidence and assurance, and what presumably the testator was accustomed to say, if one may judge from his use of the words in his testamentary dispositions. It is not to be supposed that one who was so anxious that those who benefited under his will should adhere to the doctrine of the Church of England, did not know what the doctrine was to which he desired his beneficiaries to adhere.

It is said that the testator has given no indication of what the doctrine of the Church of England was that he had in mind, and no guide as to the degree of adherence that he had in mind either; but, as I say, if the matter was being discussed for the first time in the courts, I think that, giving plain words their plain meaning, and interpreting the testator's words to ascertain his intention, the question in the originating summons would not have presented the difficulty which it does in the circumstances of today. For the question does not come before the court for the first time, and it has, indeed, been the subject of great and prolonged disputation and examination by many judges; and many judicial decisions have been given. It is, therefore, necessary to consider the question before us in this appeal in the light of that history, and the judicial decisions.

[20a] [1953] Ch. 116, 123.

The proceedings with which we are today concerned arise out of the answer made by Vaisey J. to the first question asked in the originating summons. That question asked whether the devise made by the testator in the terms set out, was valid, or was void for uncertainty. Vaisey J. answered that in his view it was void for uncertainty; and this appeal is brought against that decision.

It seems particularly fitting for me, in discussing the judgment of Vaisey J., to acknowledge the great learning and the wide experience of the judge in the Chancery Division, and also his special knowledge of things ecclesiastical, to which I can make no claim. But I think that some of the problems are solved once it becomes clear that the words used by the testator are not to be regarded as a condition subsequent. Vaisey J. was clearly of opinion that the words were not to be regarded as a condition subsequent; and further, that there was a distinction to be observed in construing words when they formed a condition subsequent, as opposed to a condition precedent, when questions affecting the certainty of the meaning of the words were being considered. It was for this reason that he found *Clayton* v. *Ramsden*[20] of little help, and differed from the judgment of Callan J. in the New Zealand case of *In re Biggs*.[21] The material words in *In re Biggs*[21] were "adherent of . . . the "Church of England," and Callan J. had expressed the view that the standard of certainty required was the same, whether the words used formed a condition subsequent or a condition precedent. It was from this view that Vaisey J. dissented. In my opinion, the words employed by the testator in the case before

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[20] [1943] A.C. 320.

[21] [1945] N.Z.L.R. 303.

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us should be considered as a description or qualification or a condition precedent and not as a condition subsequent.

In the earlier part of his judgment Vaisey J. discussed the various ways in which a man might claim to be a member of the Church of England, and in one passage he said [21a]: "Another "meaning and a much narrower meaning is this: a member of "the Church of England is a person who, having been baptised "and confirmed, regularly attends the Parish Church, conforms, "so far as he can, to the discipline which is laid down by the "formularies, and has his name on the electoral roll of the "parish; who would call himself 'C. of E.' or, at any rate, "would say negatively: 'I am not a dissenter or a non-"'conformist; I am a churchman.'"

I should imagine that a high proportion of those calling themselves members of the Church of England, if called upon to explain why they so called themselves (possibly with a little prompting) would make this answer or one very like it. But in my view they are entitled to call themselves members of the Church of England, although other people may give different reasons why they so describe themselves. The testator did not say more than "a member of the Church of England"; and once a man has shown himself to be such a member, the description is satisfied. The slightest acquaintance with the history of the Church of England makes it plain that within its borders are men and women who differ acutely from each other on questions of theology and procedure. Men may be described as High Churchmen, Broad Churchmen, Evangelicals, Tractarians, Ritualists, upholders of the Establishment or opposed to it; but they all claim to be members of the Church of England.

In *In re Tegg* [22] the words to be considered were: "should "at all times conform to and be members of the Established "Church of England." Farwell J. held the words to be a condition subsequent and held the condition void for uncertainty, but in the course of his judgment he said [23]: "It may be— "I am not deciding this—that if the testator had been content "to say 'should be members of the Established Church of "'England,' that might be a matter of some certainty, but that "is not enough, because the lady and her children must 'at "'all times conform to'." But on the first part of the words we are considering it seems that Farwell J. did not seem to think that they were incapable of a definite and certain meaning.

[21a] [1953] Ch. 116, 118.

[22] [1936] 2 All E.R. 878.

[23] Ibid. 881.

And *In re Perry Almshouses* [24] Stirling J. said: "Whatever "difficulty there may be in giving a strict legal definition of "what constitutes membership of the Church of England, I "think that a person who has been baptised, has been confirmed, "or is ready and desirous to be confirmed and is an actual "communicant, does hold the status of a member of that "church, and would be ordinarily regarded and spoken of as "such." That judgment was upheld in the Court of Appeal, and it has declared that there was a charity for members of the Church of England. Vaisey J. seemed to think that there was a different kind of test for admittance to an almshouse as a member of the Church of England from that which is required to qualify a man to take benefits under a will as a member of the Church of England; but I confess to some difficulty in seeing where the distinction lies. In both cases the essential thing seems to be that it should be made plain that the applicant in the one case, and the beneficiary in the other, is a member of the Church of England; and Stirling J. and the Court of Appeal both thought that the qualification could be ascertained and established.

It is clear, I think, that a definite and certain meaning can be given to the words "a member of the Church of England," and if it be right that the words are a description or a qualification or a condition precedent, then a claimant to the gift ought not to be debarred from trying to show that he fulfils the qualification. The Church of England is an institution bound into the national life by a thousand links, legal and historical. It seems to me to be a very strange conclusion that when millions of people, drawn to that Church by ties of piety, or feeling, or history, claim to be and are recognized to be members of that Church, this court should say that the words employed by this testator are so uncertain in their meaning as to be void, and the beneficiary is not even entitled to try to show that he occupies a position that millions of his countrymen enjoy without any question being raised.

With great respect, I venture to differ from Vaisey J. on the first part of the words, and I would hold that the words "a "member of the Church of England" are capable of having a definite certain meaning attached to them, and that R. S. Allen should be given the opportunity to show that he is a member of the Church of England.

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[24] [1898] 1 Ch. 391, 400.

The second part of the words used by the testator—" and an " adherent to the doctrine of that Church "—present much more difficulty. The problem is best seen, perhaps, by formulating two questions. The first question is: What is the doctrine of the Church of England? and the second question is: What is meant by " an adherent to that doctrine "?

Here again, at first sight, it would seem to be a very strange thing if the answer to the first question should be: " Nobody " really knows "; it is so uncertain that if the words form part of a condition precedent, a possible beneficiary would be quite unable to satisfy the condition, because the words " the doctrine " of the Church of England " are void for uncertainty. No beneficiary could be an adherent to that doctrine in those circumstances whatever the meaning of the word " adherent " may be. Vaisey J. said [25]: " What is the doctrine of the church? It is a " body of beliefs of a very wide character, covering the whole of " human experience and divine revelation, but not capable of being " reduced to the certainty of a code or anything of that sort." It may very well be that there is no one specific test which can be applied to decide what it is that constitutes membership of the Church of England, and, further, that there is no precise formulation of the doctrine of the Church of England in some recognized code, so that it is possible to say: " Here is the doctrine of the " Church of England and it is not to be found elsewhere." But do these two things in conjunction compel this court, in the precise case before us, to say that the words the testator has chosen to use are void for uncertainty? With great respect to Vaisey J., I think not.

So far as the clergy are concerned, after the passing of the Clerical Subscription Act of 1865, a clergyman was only called upon to make the following declaration: " I assent to the Thirty- " nine Articles of Religion, and to the Book of Common Prayer " and of the Ordering of Bishops, Priests, and Deacons. I believe " the doctrine of the Church of England as therein set forth, to " be agreeable to the Word of God; and in public prayer and " administration of the Sacraments I will use the form in the " said book prescribed and none other, except so far as shall be " ordered by lawful authority."

But although clergymen were required to assent to the doctrine of the Church of England in these words, no such assent, so far as I know, is required from lay members of the Church of England; and, for my own part, I do not think that the decision in this case requires a consideration of the extremely difficult questions which have perplexed scholars and Divines and laymen in many ages when seeking to formulate with any precision the doctrine or faith of the Church of England. Undoubtedly there are those who seek for more precision, and those who seek for a larger freedom for the members of the Church in what they must hold or preach. But this I think to be clear: that if any dignitary of the Church of England, or any layman of great standing in the Church, had happened to be the beneficiary under the will of the testator, it would be a surprising thing to say that he failed to bring himself within the meaning of the words used by this testator.

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[25] [1953] Ch. 116, 120.

If the true rule of construction be that the court must take the words used by the testator and gather from the words the intention of the testator, and, having done that, seek to give effect to the intention of the testator, then I think, for myself, that in this case it is possible to gather the intention and to give sensible expression to it. The testator was not content to say, "who shall "be a member of the Church of England," but added, "and who "shall be an adherent to the doctrine of that Church." First of all, therefore, the testator would seem to have had in mind that there might be many persons who claimed to be members of the Church of England who were members in name only, and the added words would seem to indicate his view that it was not enough to render lip service only. The words "an adherent to "the doctrine of that Church," seem designed to secure sincerity and a conscientious attachment to the Church of England, and the forsaking of any other. It is, perhaps, a fair assumption to make, that a testator who used words such as these believed himself to be a member of the Church of England and an adherent to the doctrine of that Church; otherwise he would not have laid down the condition in these words.

It is not to be supposed that the testator was himself acquainted with all the niceties of doctrinal disputation, but rather that he was using words as an ordinary layman who was a sincere member of the Church of England. And when he uses words such as "the doctrine of that Church," he must be taken, I should have thought, as meaning the general teaching of the Church of England, as opposed to the distinctive teaching of other denominations. When he uses the word "adherent," he is using a word

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that is commonly used as meaning "one who conforms to," or "one who is attached to"; and to say that it is impossible to know what the testator meant by the use of the word because no guidance is given as to the degree of adherence, is, I think, with the utmost respect to those who take and have taken a contrary view, to import doubt that ought not to exist when the whole of the words used are given their ordinary meaning. I cannot subscribe to the view that it is impossible to say what is the doctrine of the Church of England. In my view, it is capable of reasonable formulation. I also think that it is possible for a man to say: "I conscientiously and sincerely agree with that doctrine," which is all that an adherent is required to do, as I understand and interpret the word as used by the testator.

I am fully conscious of the limitations on the power of this court in a matter of this kind. It must construe the words the testator has used, and not make a new or amended will for the testator, which might seem more conformable to what is thought to be right or just. But, in my judgment, the testator has used words in this case which are capable of a sensible and definite meaning, and any claimant under the provisions of the will ought to be allowed to try to bring himself within the scope of those words.

That may not be easy, and I do not know what the exact facts may be. The trustees will have to decide whether the claimant fulfils the condition expressed in the will by the testator. They will have to decide, as I think, whether the claimant is a member of the Church of England, giving his sincere allegiance to it, and accepting the characteristic and distinctive teaching of the Church. These things, I venture to think, are capable of a sensible and definite meaning, and in my view, when the testator used the words "a member of the Church of England and an adherent to "the doctrine of that church," he was not using words that ought to be held void for uncertainty, and the claimant should be permitted to show, if he can, that he fulfils the condition.

For these reasons, I would allow the appeal.

ROMER L.J. The person who claims as devisee upon the death of Francis Allen must establish four things, viz.: (1) that he is a son of Francis Allen; (2) that he is a member of the Church of England; (3) that he is an adherent to the doctrine of that Church, and (4) that there is no brother older than he who is a member and an adherent as aforesaid. In a sense it is true to say that the qualifications embodied in points (2) and (3) constitute conditions precedent, for proof that the claimant possesses them precedes the vesting of any legal or beneficial interest in the property. However, I agree with the Master of the Rolls that it is more accurate to regard the qualifications as forming part of the description of the devisee—as though, for example, the gift had been to the tallest son of Francis Allen; and I approach the question as to the validity of the devise upon that footing.

On this view the difficulty which arises is whether the testator has described the beneficiary whom he had in mind with a sufficient degree of certainty to enable the court to identify him; and the principle which is relevant to this question is " id certum " est quod certum reddi potest." The first point which I propose to consider is whether an inquiry whether any particular individual is or is not a member of the Church of England would be foredoomed to failure from the start on the ground that it is not possible to answer that question in regard to anyone at all. If failure were inevitable, then a gift depending on the possession of the prescribed qualification could not take effect, for the testator would have introduced into the description of the beneficiary an element of uncertainty which could not, by inquiry, be rendered certain. If, on the other hand, the true view of the matter is that it might be predicated of some people that they were members of the Church of England, the fact (if fact it be) that it could not be predicated of others would not automatically invalidate a gift which was dependent in its vesting upon possession of the qualification. Is it, then, beyond the power of the court to ascertain of anybody, with a reasonable degree of certainty, whether he can be said to be a member of the Church of England?

This question is not free of authority. In *In re Perry Almshouses*,[26] the founder of an eleemosynary charity prescribed by the instrument of foundation that the objects should be selected from persons who should have (1) regularly attended divine service at the Parish Church for a fixed period, (2) been partakers of the Holy Communion, and (3) lived a godly, righteous and sober life to the glory of God's Holy name; and that the trustees should be members of the Church of England. The question before the court was whether this was a charity the endowment whereof was held for the benefit of members of the Church of England " as " such," and accordingly whether the charity was an ecclesiastical charity. During the argument before Stirling J. it was contended (inter alia) on behalf of the Charity Commissioners that there was no legal definition of membership of the Church of England and that the only test of membership was by a person conscientiously declaring himself to be a member. The contrary argument, which was advanced by counsel for the trustees of the charity, was that as there could be no question but that there was an Established Church the suggestion that the phrase " a member " of the Church of England " had no meaning was not tenable; and that the difficulty of predicating whether in a particular case a person was or was not a member would not prevent the court from giving effect to that phrase.

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[26] [1898] 1 Ch. 391; affirmed [1899] 1 Ch. 21 (C.A.).

In the course of his judgment (in which he held that the charity was an ecclesiastical charity) Stirling J. expressed his conclusion upon this question as follows [27]: " Whatever difficulty there may " be in giving a strict legal definition of what constitutes member-" ship of the Church of England, I think that a person who has " been baptized, has been confirmed, or is ready and desirous to " be confirmed, and is an actual communicant, does hold the " status of a member of that Church, and would be ordinarily re-" garded and spoken of as such." In the Court of Appeal Lindley M.R. said [28] " It is very forcibly urged by the appellants that the " founder has not, in terms, made such membership [of the " Church of England] a condition for participating in her charity. " The appellants contend that such a condition cannot properly be " inferred from the terms of her gift. It is urged that it is quite " consistent with those terms that she did not intend to do more " than require performance of the conditions which she expressly " prescribed. The answer to this argument is that, although it " may be true that some persons may conscientiously perform " these conditions without being members of the Church of " England, there is nothing to show that the founder ever thought " of them. She specified those conditions as the most obvious " means of ascertaining who were such members. She took it for " granted that poor persons conducting themselves as she required " would be members of the Church of England; and a construc-" tion which would let in a succession of hypocrites is, in my " opinion, clearly inadmissible. . . . I feel the force of the " observation that, if the founder had been asked whether any " further inquiries were to be made to ascertain whether per-" sons conforming with her requirements were really members

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[27] [1898] 1 Ch. 391, 400.

[28] [1899] 1 Ch. 21, 31.

"of the Church of England, she might have said 'No,' and "might have been content with the test she imposed. It may "be extremely difficult to determine whether a constant worshipper at church, who partakes of the Holy Communion and "leads a godly, righteous, and sober life to the glory of God's "Holy Name, is or is not a member of the Church of England. "Prima facie he would be taken to be so, and the founder took the "risk of non-members, whether conscientious or unconscientious, "benefiting by her charity."

Chitty L.J., in dealing with the same point, after referring to the three tests which the founder had prescribed, said [29]: "These three tests are all practical, and eminently so—indeed, "as efficient as any that can be reasonably suggested for ascertaining whether a person is a member of the Church of England. "If the question is asked, is a person who complies with these "tests, who attends the parish service every Sunday for five "years, partakes of the Holy Communion, and leads the life "described, a member of the Church of England? It seems to "me that the answer cannot be otherwise than in the affirmative." Vaughan Williams L.J. said that he had no doubt but that the charity was one for the benefit of members of the Church of England as such and in no way indicated any doubt as to the meaning of that phrase. In *In re Tegg* [30] Farwell J. refrained from expressing a definite opinion on the question whether the expression "Members of the Established Church of England" in relation to a condition subsequent was sufficiently definite in itself to be enforceable, but confined himself to saying that the expression [31] "might be a matter of some certainty."

The result of the cases above cited is that Stirling J. and two members of this court expressed the view (from which the third member did not dissent) that there are at least some people in this country of whom it can be postulated that they are members of the Church of England; whilst Farwell J., although leaving the point unanswered as a matter of decision, did not indicate a contrary view. It accordingly seems to me that a departure from the opinion of Lindley M.R., Stirling J. and Chitty L.J. would only be justified if this court were satisfied that those opinions were manifestly erroneous. For my part I think that they were manifestly right. The contrary view would result in the disqualification of any one of the highest dignitaries of the Church from claiming a legacy to which the only condition attached by the testator was that the taker should be "a member of the Church "of England." Such a conclusion, I venture to think, would come as something of a shock to the public conscience. It may well be that it would be difficult, if not impossible, to say of some persons whether they are or are not members of the Church of England; but (as was argued for the trustees before Stirling J. in *In re Perry Almshouses* [32]), that consideration does not of necessity render it impossible for some particular individual to establish that he is. It seems to me, therefore, that the claimant in the present case would at least be entitled to prove, if she could, that her husband possessed such qualifications as Lord Lindley and Chitty L.J. referred to in the judgments to which I have referred, if she can also show that he satisfied the second part of the requisite qualification, viz., that he was an adherent to the doctrine of the Church of England.

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[29] [1899] 1 Ch. 34.

[30] [1936] 2 All E.R. 878.

[31] Ibid. 881.

I now turn to this further requirement. The primary question here, again, is whether this part of the qualification is of so uncertain a nature that an inquiry whether any particular individual satisfied it would be useless at the outset on the ground that it could not be answered in relation to anyone. Vaisey J. has expressed the view, and has given cogent reasons to support it, that it is impossible to say, with any approximation to certainty, what the testator meant by the language which he has used; and that as the court cannot therefore ascertain whether any person who claims as devisee is qualified to take or not, the gift of necessity fails. I think that this question is an exceedingly difficult one, but I have come to the conclusion on the whole that the judge was right.

The two reasons which have mainly led me to this conclusion are, first, that I do not know what the testator meant by the doctrine of the Church of England; and secondly, if I did know to what doctrine the devisee had to adhere, I have no idea as to the degree or manifestation of adherence which the testator had in mind. No evidence was before the court (as I suspect that it would have been if any had been available) to prove either what the testator meant by referring to the doctrine of the Church of England or what that expression means in its ordinary acceptation. It is referred to in section 1 of the Clerical Subscription Act, 1865, but the phrase as there used is referable only to the taking of the oath by priests and embodies, moreover, a definition which it is improbable in the extreme that the testator had ever heard of. There is accordingly no certainty, and no means, so far as I am aware, of achieving any degree of certainty, as to the doctrine to which the devisee is required by the will to adhere.

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[32] [1898] 1 Ch. 391.

Even, however, if the doctrine could be ascertained or the assumption made that adherence to the Church of England was all that the testator had in mind, there would remain the difficulty of what adherence means when the word is used in relation to a religious teaching or faith. "To adhere" to the Church of England is much the same thing as "to conform" to it, and Farwell J. in *In re Tegg* [33] was constrained to admit that he did not in the least know what that phrase meant. A like inability was confessed in the decisions in the New Zealand cases of *In re Lockie* [34] and *In re Biggs*,[35] and by the very learned judge from whom this appeal has been brought. In *In re Lockie* [36] Smith J. put to himself a series of questions for the purpose of testing the meaning of adherence. I do not repeat them, but they show convincingly, to my mind, the uncertainty which must of necessity attach to the word in relation to religious belief. Some of the tenets of the church may be said without irreverence to be contrary to all established scientific experience. Does a man "adhere" to such tenets if he accepts them merely as imagery or allegory, or does nothing short of absolute and literal belief constitute adherence? Does outward acceptance of a doctrine suffice whatever the degree of mental reservation? Must the doctrine be accepted in its entirety or may certain exceptions be permitted, and if so, what?

Unless a testator gives some guidance on these points, I know of no authority that the court possesses to set up signposts of its own; so to do is to extend the power of testamentary construction into the field of testamentary disposition and thus to perform a function which lies outside the jurisdiction of the court. A man must exercise the testamentary power himself; neither the court nor his executors can do it for him (compare the observations of Lord Simonds in *Chichester Diocesan Fund & Board of Finance (Incorporated)* v. *Simpson*.[37] In the present case the testator has given no sufficient guidance in the matter of adherence to doctrine, nor are there any means, in my opinion, by which his intention can be satisfactorily ascertained; and in these circumstances it is

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[33] [1936] 2 All E.R. 878.

[34] [1945] N.Z.L.R. 230.

[35] Ibid. 303.

[36] [1945] N.Z.L.R. 230.

[37] [1944] A.C. 341, 371; 60 T.L.R. 492; [1944] 2 All E.R. 60.

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impossible, in my judgment, to postulate of any son of Francis Allen that he is within the specified description.

It is important to note that the testator was apparently drawing a distinction between membership of the Church of England on the one hand and adherence to its doctrine on the other. This suggests to me that the difference which he had in mind was between outward conformity to the church, which could be demonstrated by membership of it, and sincerity of belief in its teaching, which could, as he thought, be proved by "adherence" to its doctrine. He has failed, however, to explain either the doctrine which he had in mind or the degree of sincerity which he required, or the manner in which such sincerity was to be manifested; and the result of his omission in these respects is, in my judgment, that it is impossible for the court to identify the object of his bounty and the gift, accordingly, fails.

It appears to me that it is difficult to reach a contrary conclusion consistently with the reasoning of the majority speeches in *Clayton* v. *Ramsden.*[38] The gift in that case was to determine if the testator's daughter should marry a person "not of Jewish "parentage and of the Jewish faith," and the House held that that provision of defeasance was void for uncertainty. In the course of Lord Russell of Killowen's speech he observed that the words "of Jewish parentage" referred to race and then proceeded[39]: "Must both parents be of the Jewish race, or would "one alone, and which, suffice? I confess myself unable to find "any context which provides an answer, but the answer may well "be that, in the absence of a context to the contrary, the true "construction is that both parents must be of the Jewish race. "But at this point the real difficulty begins, namely, the question "of degree. The testator has given no information or clue as to "what percentage or proportion of Jewish blood in the husband "will satisfy the requirement that he should be of Jewish "parentage. The daughter could never, before marrying the man "of her choice, be certain that he came up to the requisite "standard of Jewish parentage, nor could a court enlighten her "beforehand. The standard is unknown, and incapable of ascertainment. It is this uncertainty of degree which prevents "the divesting event from being seen precisely and distinctly "from the beginning, and which makes this condition void for "uncertainty. The uncertainty attaching to the requirement of "Jewish parentage avoids the whole condition subsequent, with

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[38] [1943] A.C. 320.

[39] Ibid. 328.

"the result that no defeasance takes place. In these circum-"stances it is unnecessary to express an opinion on the certainty "of the words 'of the Jewish faith,' but, had it been necessary, "I should have felt a difficulty in holding that their meaning was "clear or certain. It seems to me that (apart from the difficulty "which arises from the existence of the three varieties of Judaism "referred to by the Master of the Rolls) the testator has given "no indication of the degree of attachment or adherence to the "faith which he requires on the part of his daughter's husband. "The requirement that a person shall be of Jewish faith seems "to me too vague to enable it to be said with certainty that a "particular individual complies with the requirement."

It is true that the condition in *Clayton* v. *Ramsden* [40] was a condition subsequent and that the courts have always required such conditions to be defined with precision. Nevertheless, the conclusion which Lord Russell reached derived from the poverty of guidance by the testator as to what he really intended and by his failure to describe the qualities which he required of the man whom his daughter might subsequently marry. The House therefore held that it was not possible to say of any man that he did in fact possess those qualities and, instead of establishing some criterion of its own, rejected the condition as being unsusceptible of ascertainable meaning. In my opinion a parallel result must logically follow in a case where the description relates, not to the person on whose ascertainment a gift is to determine, but to the person to whom the gift is bequeathed. If the gift in *Clayton* v. *Ramsden* [40] had been, e.g., a legacy to the eldest of the testator's employees who should be "of Jewish parentage and of the Jewish "faith," it is difficult to see how, consistently with the reasoning of Lord Russell (and I may add that the reasoning of Lord Romer followed a very similar line) any of the employees could have been held entitled to take; for if, in the words of Lord Russell, it is unknown and unascertainable whether a person is or is not of Jewish parentage, then no employee could have established a claim by showing that he was; per contra, if effect could have been given to the description, the condition in *Clayton* v. *Ramsden* [40] would presumably not have been held void for uncertainty, for the court would have been able to "enlighten" the daughter before she contracted a marriage.

In such cases as the present it seems to me that the only

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[40] [1943] A.C. 320.

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escape (were it permissible) from the difficulty would be to disregard the qualification as being merely subordinate to the gift (and in some instances that might indeed be possible) or, upon the same justification, to treat it as sufficiently satisfied by conformity to some test which the court itself thinks reasonable to apply. I do not think, however, that either of these courses would be legitimate in the present case; the testator has shown unmistakably that he looked upon adherence to church doctrine as an essential quality in the devisee, and it is not permissible, in my opinion, either to abrogate the requirement or to guess what he meant by introducing it and thus establish a speculative standard. Many people might hazard many different guesses, and even if the majority of them guessed the same the principle id certus est quod certum reddi potest can only be applied, in my judgment, where that which the testator has left uncertain can be rendered certain, not where it can only be rendered probable.

In these circumstances it seems to me that it would be of no use to direct an inquiry as to whether Reginald Allen qualified or not without also giving directions to the master as to what meaning he should attribute to the " doctrine " of the Church of England, and as to the degree, quality and manifestation which the testator intended in the use of the word " adherent "; and, for the reasons which I have attempted to explain I, for my part, would feel quite unable to give any such directions.

I accordingly agree with Vaisey J. that this part of the qualification or description of the intended devisee is expressed in such uncertain terms that it is impossible to ascertain whether he was the eldest, or some other, or none of the sons of Francis Allen; and that the devise must accordingly fail. It follows that I would dismiss the appeal, but as my Lords take a different view the appeal will be allowed.

Appeal allowed.

Solicitors: *Thicknesse & Hull and Capel Cure & Ball; Hore, Pattisson, Bathurst, Summerhays & Co.*

E. D.

END OF VOLUME AND OF CHANCERY SERIES FOR 1953.

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